IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-99

CHIEF HARRY PARKER
Petitioner,

vs.

JAMES RANDOLPH, WILBURN LEE PICKENS, and ISAIAH HAMILTON
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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The Petitioner, Chief Harry Parker, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit rendered in this proceeding on May 19, 1978, wherein the Court of Appeals affirmed the United States District Court which has issued the writs of habeas corpus for the respondents, three prisoners incarcerated by the State of Tennessee.

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978,

is styled *Randolph, et al. v. Parker*, Nos. 77-1463-65, and is attached hereto as Appendix "A".

The case arose as separate petitions for federal habeas corpus relief which were consolidated in the United States District Court for the Western District of Tennessee, Western Division. At the district level these cases were styled *James Randolph v. Chief Harry Parker*, Civil C-76-68; *Wilburn Pickens v. Chief Harry Parker*, Civil C-76-69; and *Isaiah Hamilton v. Chief Harry Parker*, Civil C-76-310. On May 2, 1977, Chief Judge Brown entered a memorandum decision which is attached hereto as Appendix "B".

The opinion of the Supreme Court of Tennessee, reversing the Tennessee Court of Criminal Appeals, and affirming the convictions of the respondents, was filed on December 15, 1975 and a copy is attached hereto as Appendix "C". The opinion of the Tennessee Court of Criminal Appeals, reversing the convictions of the respondents, was filed on June 5, 1974 and is attached hereto as Appendix "D". None of these opinions are reported.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was rendered on May 19, 1978. The State did not file a petition to rehear. This petition is timely filed within ninety (90) days of the date of decision. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2254(d).

"State Custody; remedies in Federal courts.—

* * * * * * *

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit has correctly interpreted the law as stated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968); *Schneble v. Florida*, 405 U.S. 427 (1972); and *Harrington v. California*, 395 U.S. 250 (1969).

2. Whether the United States Court of Appeals and the District Court have violated 28 U.S.C. § 2254(d), by finding that one of the respondents was denied his right to counsel.

STATEMENT OF THE CASE

The two questions before this Court are questions of law. However, the following summary of facts is submitted so that this Court may be well acquainted with the factual basis upon which the three respondents were convicted in state court. Other summaries of facts appear in the opinion of the Court of Criminal Appeals (Appendix D), the opinion of the Supreme Court of Tennessee (Appendix C), the Magistrate's preliminary report, the District Court's memorandum decision (Appendix B), and the memorandum decision of the United States Court of Appeals, Sixth Circuit (Appendix A).

The three respondents were convicted for the participation in the murder and robbery of William Douglas, in Memphis, on July 6, 1970. Mr. Douglas was a professional gambler who had, for some time prior to his murder, been winning money from Robert Wood, one of the respondents' co-defendants in state court. Mr. Douglas, by using marked playing cards, had cheated Robert Wood out of approximately $5,000 in three poker games set up between the two, spanning the three weeks prior to the Douglas murder.

Robert Wood suspected that he was being cheated and enlisted his brother, Joe Wood, also a co-defendant at the trial, in a scheme to recoup his losses. The scheme was for Robert to set up a game with Douglas, and for his brother, Joe, and the three respondents to rob the game, and thus recoup some of Robert's losses. Prior to the night of the murder, Joe took two of the respondents, Hamilton and Pickens, to the scene of the game, pointed out to them the particular apartment

where the game would be played, promised them $3,000 to $4,000 to rob the game, and also told them that he would be inside in the game and would kill Douglas, if he had to. James Randolph was enlisted by Joe Wood to participate in the scheme on the night of the murder, July 6, 1970.

On the night Robert Wood and William Douglas began playing poker at approximately 7:30 p.m. Joe Wood and one Tommy Thomas sat in the same room as spectators. Sometime before 9:00 p.m., Joe Wood announced he was going to get some beer. While allegedly obtaining beer, Joe Wood met with the three respondents. After a brief meeting, a trip to a nearby restaurant, the purchase of some beer, and the positioning of their automobiles, the four men approached the apartment. Those inside heard people approaching and Douglas, fearing a break-in, armed himself with a shotgun. Joe Wood convinced Douglas he was alone, and his three companions returned to their automobiles. Douglas made Joe Wood crawl through a small window next to the door. Once Joe Wood was back in the room, Douglas resumed the poker game. The game was resumed for some five to ten minutes when Joe Wood arose and asked permission to go to the bathroom. He came out of the bathroom armed with a gun and walked behind Douglas, ordering Thomas and Douglas to lie on the floor. Joe Wood then handed the gun to his brother, and ran out the door, leaving it open. Thomas, in an effort to avoid the shooting, arose from the floor, closed the door and attempted to talk to Robert Wood. Douglas then made a move for the pistol in his belt and Robert Wood killed him. Within seconds, the three respondents kicked in the door and one of the three fired a shot at Robert Wood. The record shows that Joe Wood had summoned them when he ran from the apartment. One of the respondents then searched Thomas and took from him a knife and $80.00. Robert Wood then took all the money on the table and stuffed it in his pockets. Everyone then left with the exception of Thomas, who remained behind

with Douglas. Robert and Joe Wood, Isaiah Hamilton, and James Randolph went to the apartment of Hamilton where they hid the weapons and split the money, with Hamilton and Randolph receiving $50.00 apiece. Pickens did not go to the Hamilton apartment, and received no money.

Subsequent to this incident all five co-defendants were either arrested or surrendered themselves to the Memphis police. Statements were taken from all except Joe Wood. At trial only Robert Wood took the stand. The statements of Hamilton, Pickens, Randolph and Robert Wood, all found by the trial judge to have been given freely and voluntarily, were admitted into evidence through the testimony of several police officers of the Memphis Police Department. In an effort to comply with *Bruton*, the trial court and all counsel diligently attempted a program of redaction for each of the statements.

On July 25, 1972, the two Woods and the three respondents were found guilty of murder in the perpetration of a robbery, in the Criminal Court of Shelby County (Memphis), Tennessee. Punishment for each was set at life in the state penitentiary. These convictions were appealed to the Court of Criminal Appeals of Tennessee and, on June 5, 1974, the Court of Criminal Appeals rendered a divided decision reversing the convictions of all five defendants. The State petitioned to the Supreme Court of Tennessee and certiorari was granted. On December 15, 1975 the Supreme Court of Tennessee rendered a per curiam opinion reversing the Court of Criminal Appeals and affirming the convictions.

In February of 1976 Wilbur Pickens and James Randolph sought resort to the federal courts by filing petitions for the writ of habeas corpus. On March 17, 1976 the State responded to the cases of Randolph and Pickens. Subsequently, Isaiah Hamilton petitioned for the writ of habeas corpus and his case was consolidated with that of the other two respondents. The cases

were referred to a Magistrate for report. After several responses by the State and several references to the Magistrate, an evidentiary hearing was set by Chief Judge Brown and held in Memphis on April 29, 1977. On May 2, 1977 Chief Judge Brown rendered a memorandum decision concluding that the admission into evidence of Pickens' confession was constitutional error in that it violated his rights as set out in the *Miranda* case. Judge Brown also found that the rights of all three petitioners pursuant to the *Bruton* doctrine were violated, and the Court was unable to conclude that this violation was harmless error. A judgment was entered in accordance with the memorandum decision and the State was ordered to discharge the petitioners from custody unless they were retried within a reasonable time, or a timely appeal was taken.

A timely appeal was taken by the State to the Court of Appeals for the Sixth Circuit and on May 19, 1978 the United States Court of Appeals rendered a decision affirming the District Court.

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Sixth Circuit has voided three first degree murder convictions, obtained six and one-half years ago. The State of Tennessee is very much aggrieved by the decision of the Sixth Circuit and submits that this decision is based upon a misinterpretation of certain decisions of this Court and, further, clearly conflicts with federal statutory law.

The Sixth Circuit's decision is primarily based upon a finding that the respondents' constitutional rights, as enunciated by this Honorable Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner/State has maintained throughout the federal proceedings that the doctrine of *Bruton* is inappropriately applied to this case. The case sub judice is much more analogous to the factual situation before this Court in *Schneble v. Florida*, 405 U.S. 516 (1972) and *Harrington v. California*, 395 U.S. 296 (1969). In *Bruton* there was one confession and no testimony by either co-defendant. In this case, there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant. In both *Schneble* and *Harrington*, the parties raising the *Bruton* objection had confessed themselves. The same is true in this case. This distinction is important since a reviewing court considering the issue of harmless error must consider the confessor's confession against himself. This case should not be labeled a *Bruton* case. The case before this Court is a *Schneble* or a *Harrington* case, if it must be labeled at all.

There has existed for some time considerable split and confusion among the various circuits as to the application of *Bruton* to facts which are not on point with *Bruton*. Simply stated, if the case sub judice had arisen in another circuit, then the decision quite probably would be different. This split among the circuits is expressly recognized in the Sixth Circuit opinion.

Judicial attempts in the various circuits to distinguish cases such as the one sub judice from *Bruton* have resulted in the evolution of the interlocking confession theory, which has been impliedly sanctioned by this Court. *See Catanzaro v. Mancusi*, 404 F.2d 296 (1968), *cert. denied*, 397 U.S. 942 (1970). There is considerable disagreement as to whether the interlocking confession theory is in reality a finding that *Bruton* is inapplicable to such cases, or whether the theory is an application of *Harrington* and, thus, in reality a finding of harmless error. *See Ortiz v. Fritz*, 476 F.2d 37 (2d Cir. 1973). The first position contends that *Bruton* simply does not apply to situations where both defendants confess and the confessions interlock. The second position contends that *Bruton* does apply but the violation is harmless error in light of the two interlocking confessions. The practical effect of both positions is the same. Further, and more important, the adoption of either theory would result in a different decision than reached in this case by the Sixth Circuit. Additionally, the Third, Fifth, Seventh, Eighth and Tenth Circuits have also rendered decisions which conflict with the decisions of the Sixth Circuit and seemingly would produce a different result than reached here. *See United States v. Digilio*, 538 F.2d 972 (3d Cir. 1976); *Mack v. Maggio*, 538 F.2d 1129 (5th Cir. 1976); *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972); *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976); *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971).

The petitioner/State contends that the opinion of the Sixth Circuit is in obvious conflict with opinions rendered by other circuit courts in similar cases. Further, the petitioner contends the decision of the Sixth Circuit results from a misinterpretation of this Court's decisions in *Bruton, Schneble*, and *Harrington*. The writ of certiorari should be granted by this Court to clear up the confusion which has resulted from the judicial attempts to apply *Bruton* to differing facts.

The United States Supreme Court decision in *Townsend v. Sain*, 372 U.S. 293 (1963), is a precursor of 28 U.S.C.

§ 2254(d). In *Townsend*, this Court set forth general standards governing the holding of hearings on federal habeas corpus petitions. Those standards now appear in 28 U.S.C. § 2254(d). Under the standards laid down in *Townsend* and embodied in 28 U.S.C. § 2254(d), a determination made on the merits of a factual issue by a state court of competent jurisdiction is entitled to a presumption of correctness in a federal habeas corpus proceeding unless the applicant for the writ can prove one or more of the first seven standards listed in § 2254(d), or unless the federal court concludes that the record in the state court proceeding, considered as a whole, does not fairly support the factual determination. In *LaVallee v. Delle Rose*, 410 U.S. 695 (1973), this Court further elaborated on *Townsend* and 28 U.S.C. § 2254(d). In *LaVallee*, the admissibility of a confession was at issue. The same issue was before the District Court in this case. Similar to *LaVallee*, the admissibility of the confession in this case revolved around one basically important issue—credibility. In *LaVallee*, this Court rejected an overly technical application of *Townsend* and recognized the simplicity of the major issue. This Court reversed the Second Circuit and the District Court and reinstated the factual determination made in state court. The same problem exists in this case since the Sixth Circuit has affirmed a District Court determination wherein the District Judge redetermined a factual issue previously decided in the State's favor, in state court. Thus, the Sixth Circuit opinion is erroneous and violates the principles of law set out in 28 U.S.C. § 2254(d) and elucidated in *Townsend* and *LaVallee*. For this additional reason, the writ of certiorari should issue.

ARGUMENT

I

The Court of Appeals for the Sixth Circuit Has Incorrectly Interpreted the Law as Stated by This Court in Bruton, Schneble and Harrington.

The primary basis upon which the Court of Appeals' decision rests is a finding that the respondents' constitutional rights, as enunciated by this Court in *Bruton v. United States*, 391 U.S. 123 (1968), were violated. The petitioner/State respectfully submits that the Court of Appeals incorrectly applied *Bruton* to this case.

In *Bruton*, Bruton and one Evans were jointly tried and convicted of armed postal robbery. Neither testified upon their trial. Bruton made no admissions or confessions. However, Evans did confess to the postal authorities that he and Bruton committed the robbery in question and upon trial Evans' confession, including the portion which implicated Bruton, was received into evidence. This Court reversed Bruton's conviction and held that his rights under the confrontation clause of the Sixth Amendment had been violated because there was a substantial risk that the jury, despite instructions to the contrary, had looked to the incriminating statements made by Bruton's co-defendant.

The next year this Court decided the case of *Harrington v. California*, 395 U.S. 296 (1969). In *Harrington*, this Court, with Mr. Justice Douglas writing, held that a *Bruton* type violation can constitute harmless error. In *Harrington*, four men were tried together—Harrington, a caucasian, and Bosby, Rhone, and Cooper, who were black. All four were found to have participated in an attempted robbery in the course of which a store employee was killed. Each of Harrington's co-defendants confessed and their confessions were introduced at the trial with limiting instructions that the jury was to consider each confession only against the confessor. Rhone testified, and Harrington's counsel cross-examined him. The other two individuals did not take the stand. These facts are analogous to the case now before this Court. Here, three black men and two white men have been convicted of murder in the perpetration of a robbery. Four of the individuals tried in state court made confessions which were admitted at trial. One of the individuals here, Robert Wood, testified at trial and was cross-examined by the respondents' lawyers. Much of the other evidence existing in the record identifies individuals as three blacks and a white man. This is the same sort of other evidence which existed in the *Harrington* case. In reaching a finding of harmless error in *Harrington*, this Court stated:

> "It is argued that we must reverse if we can imagine a single juror whose mind might have been made up because of Cooper's and Bosby's confessions and who otherwise would have remained in doubt and unconvinced. We, of course, do not know the jurors who sat. Our judgment must be based on our own reading of the record and on what seems to us to have been the probable impact of the two confessions on the mind of the average juror."

See Harrington, supra, 89 S.Ct. at 1728.

In 1972 this Court decided the case of *Schneble v. Florida*, 405 U.S. 516 (1972). In *Schneble*, Schneble and his co-defendant Snell were tried jointly in a Florida state court for murder. Police officers testified to a detailed confession that Schneble had given to them and one officer related a statement related to him by Snell. The statement of Snell, who did not testify, tended to undermine Schneble's initial version and to corroborate certain details of Schneble's confession. This Court confirmed the conviction of Schneble, finding any violation of *Bruton* was harmless error beyond a reasonable doubt in view of the over-

whelming evidence of petitioner's guilt as manifested by his confession, which completely comported with the objective evidence and the comparatively insignificant effect of the co-defendant's admission. *See Schneble, supra,* 92 S.Ct. at 1057, 1058-1060. In reaching this conclusion of harmless error this Court stated:

> ". . . without Schneble's confession and the resulting discovery of the body, the State's case against Schneble was virtually non-existent. The remaining evidence in the case —the disappearance of Mrs. Collier sometime during the trip, and Snell's statement that Schneble sat in the back seat of the car during the trip and never left Snell alone with Mrs. Collier—could not by itself convict Schneble with this or any other crime."

See Schneble, supra at 1059.

In *Schneble* neither co-defendant testified. What was important was the internal consistency of Schneble's confession, the corroboration by other evidence, and the lack of contradiction in the record. Most important, was the confession of Schneble which this Court, expressly stating there was little else, found to be a large measure of the overwhelming evidence against him. In the instant case, both the Magistrate's report and the opinion of the Supreme Court of Tennessee reflect findings that the confessions of Hamilton, Pickens and Randolph are essentially alike in material details and are corroborative of one another. For the purposes of this case, the lessons of *Schneble* are twofold. First, each of the respondent's own confession must be considered as part of the quantum of proof in reaching a determination of harmless error. Second, the consistency and corroborative nature of the respondent's confessions must be considered in deciding whether the confession of a non-testifying co-defendant could have significantly affected the jury's verdict. Obviously, the implication of *Schneble* is that confessions which are corroborative and consistent do

little more than the individual's own confession has already done.

The case before this Court is much more analogous to *Harrington* and *Schneble* than to *Bruton*. The Court of Appeals for the Sixth Circuit erred in strictly applying *Bruton* to this case. In *Bruton* there was one confession and no testimony by either co-defendant. In this case there are four consistent and corroborative confessions and there has been testimony by a confessing co-defendant, Robert Wood. *Bruton* did not confess. Since the only confession in *Bruton* was that of Evans, a harmless error determination, which was not at issue, would have had to be made on proof other than any confession. In *Schneble* and *Harrington* the parties raising the *Bruton* objection had confessed themselves. The same is true in the case sub judice. This distinction is important since a reviewing court considering the issues of harmless error must consider the confessor's confession against himself. As Mr. Justice White stated in *Bruton*, "The defendant's own confession is probably the most probative and damaging evidence that can be admitted against him." The distinctions are evident. This case should not be labeled a *Bruton* case.

The petitioner/State contends that under the authority of *Schneble* and *Harrington* there is ample evidence in this record to mandate a finding of harmlessness. The Court of Appeals' finding to the contrary is inconsistent with this Court's decisions in *Schneble* and *Harrington*. In reaching a decision in *Schneble* and *Harrington*, it is patently obvious that this Court considered the defendant's own confession against himself and also considered the testimony of the co-defendant who took the stand and was cross-examined. Therefore, these two pieces of evidence automatically should become part of the quantum of proof necessary to find harmless error. In fact, the only evidence in the record which is struck from the equation is the substantive

content of the non-testifying co-defendants' confessions. However, the fact these confessions are corroborative and consistent should be considered. Applying these principles to the instant case, the proof against respondent includes his own confession, the incriminating confession and testimony of a testifying co-defendant, the fact of corroboration and consistency in the excluded confessions, and all the other evidence[1] in this record. Using this formula to determine what evidence should be considered, a reviewing court should then determine what was the probable impact of the two confessions on the mind of an average juror. Using this formula, which is drawn from the *Schneble* and *Harrington* decisions, the decision of the Court of Appeals is erroneous. The most reasonable conclusion is that any error committed in the admission of the two non-testifying co-defendants' confessions is clearly harmless.

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[1] The following is a summary of the other evidence which is contained in the record: 1. Mr. Tommy Thomas, the individual who was inside when the shooting and robbery occurred, testified at trial. His testimony is harmonious and corroborative of the entire chain of events set out in the confessions. Mr. Thomas made no specific identification of Pickens, Hamilton, or Randolph. He only identified them as three negroes (State Record, p. 60, et seq.). 2. Mr. Robert Wood, the confessing co-defendant, testified at trial. Mr. Wood simply imposed a defense of self-defense which the jury apparently did not believe. Mr. Wood's testimony was consistent with the entire scheme of events and he identified Pickens, Hamilton, and Randolph as participants in the criminal episode (State Record p. 884, et seq., 912). 3. Five other witnesses testified as to facts they observed at the time of the crime. These facts were, in whole, consistent with the state's theory of the case. Although none of these individuals could specifically identify the respondents, they all testified to seeing individuals, whose descriptions were consistent with the state's theory, at the scene of the crime when it was committed. For example, a Ms. Waterbury and a Ms. Rudkins testified to seeing "three colored men" leaving the apartment after the crime was committed. A Mr. Knight testified to seeing "three blacks" at the door of the apartment attempting to break it down. A Mrs. Knight and a Mr. James testified to seeing a "white man and three blacks" at the apartment at the time the crime was committed. 4. Numerous other witnesses were produced by the state and testified to facts consistent with the state's theory of the case and consistent with the three confessions of the respondents.

In *Catanzaro v. Mancusi*, 404 F.2d 296 (1968), three individuals were tried and convicted of murder in New York state court. The confession of Catanzaro and his non-testifying co-defendant, McChesney, were admitted at the joint trial. Catanzaro sought a writ of habeas corpus and relied upon *Bruton*. The Second Circuit denied the writ and affirmed the conviction, stating:

> "The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a co-defendant who did. In our case Catanzaro himself confessed and his confession interlocks and supports the confession of McChesney.
>
> Where the jury has heard not only a co-defendant's confession, but the defendant's own confession, no such devastating risk attends the lack of a confrontation as what was thought to be involved in Bruton."

See Catanzaro, supra, at p. 300.

Simply stated, the Second Circuit in *Catanzaro* refused to apply the sanctions of *Bruton* because of the distinctions between that case and *Bruton*. The distinctions were confessions by both defendants, instead of only one, and the interlocking nature of the confessions. The Second Circuit recognized that such factors distinguish a case from *Bruton*, but the Sixth Circuit has failed to make that distinction in this case. This Court denied certiorari in *Catanzaro*. See 397 U.S. 942, 90 S.Ct. 956 (1970).

In *Metropolis v. Turner*, 437 F.2d 207 (10th Cir. 1971) two state co-defendants had been tried and convicted of murder. Both had made complete confessions which were admitted at trial with instructions that such were admissible only against the declarant. In a habeas corpus proceeding the district court

granted the petitions under the authority of *Bruton*. The Tenth Circuit reversed the district court and stated: "We need not concern ourselves with the legal nicety as to whether the instant case is without the *Bruton* rule, or is within *Bruton* and the violation thereof constituting only harmless error. In either event the judgment of the trial court (district court) must be reversed." In reversing the district court, the Tenth Circuit discussed and was persuaded by the rationale of both *Harrington* and *Catanzaro*.

In *United States v. Spinks*, 470 F.2d 64 (7th Cir. 1972) Spinks and one Turner were tried together and convicted of robbery in federal court. Spinks and Turner had both given confessions with no substantial factual differences. The other three individuals involved in the robbery did not confess and apparently their trials were severed for this reason. Turner's confession implicated Spinks and Turner did not testify. In affirming the conviction the Seventh Circuit cited *Catanzaro*, *Schneble*, and *Harrington*, and further stated:

> "There is no merit in Spinks' claim that he was prejudiced by denial of the right to cross-examine Turner. It would be ludicrous to have Spinks trying to break down Turner's confession, which implicated Spinks, while Spinks' own confession remained unchallenged, and even if Turner's confession had been excluded from the evidence—or even if Spinks' motion for severance had been granted—Spinks would still be faced with his own confession."

See Spinks, supra, at 66.

In *United States v. Walton*, 538 F.2d 1348 (8th Cir. 1976) the two defendants had been convicted in District Court of armed robbery. Both defendants confessed, and both confessions, implicating the other defendant, were admitted at trial. There was no redaction in the confessions. Neither defendant testified at trial. The Eighth Circuit affirmed the conviction and

the opinion does much to elucidate the law relating to interlocking confessions, *Bruton*, and *Harrington*. The Eighth Circuit stated: "It is now well established that *Bruton* does not automatically call for a reversal where interlocking confessions of a co-defendant tried at the same time are admitted in evidence, and that there should be no reversal where the appellate court is convinced that a complaining defendant was not subjected to a substantial risk of incurable prejudice as a result of the admission of his co-defendant's confession." *See Walton, supra* at 1353.

In reaching this conclusion in *Walton* the Eighth Circuit, like the Tenth Circuit in *Metropolis* found that from a practical standpoint it made no difference whether the Court held the admission of the confessions was not erroneous or whether they found the error harmless beyond a reasonable doubt. The Eighth Circuit also cited both *Harrington* and *Catanzaro* in supporting their decision.

In *Mack v. Maggio*, 538 F.2d 1129 (5th Cir. 1976), three co-defendants had confessed in the same crime. The confessions interlocked with only slight variances, and they were admitted with none of the confessors testifying. Two of the state prisoners sought federal habeas corpus relief which was refused by the district court. The Fifth Circuit affirmed and found that *Bruton* was inapplicable to such situations.

In *United States v. Digilio*, 538 F.2d 972 (3rd Cir. 1976) three men, Digilio, Lupo, and Szwandrak were convicted in the United States district court for conspiracy. Statements taken by the F.B.I. from Lupo and Szwandrak were admitted at the joint trial. These statements were redacted when read to the jury and neither Lupo or Szwandrak testified. All references to Digilio were deleted. The Third Circuit expressly disapproved of the suggestion that there is "a parallel statement" exception to the *Bruton* rule. Nevertheless, the Third Circuit affirmed the con-

viction on the basis of harmless error and in doing so mentioned a corroborative effect of the consistent confessions.

Although the above cited Circuit Courts differ somewhat in reaching their conclusions, the basic conclusion is consistent and clear—confessing co-defendants whose confessions are consistent and corroborative do not stand in the same shoes as Mr. Bruton. This result reached by the Second, Third, Fifth, Seventh, Eighth and Tenth Circuits, is contrary to the result reached in the case sub judice by the Sixth Circuit. *Bruton* is a specific case with specific facts and its application has not been extended since the decision in 1968. *Bruton* should not be applied to the factual situation before this Court. The Sixth Circuit's decision in this case conflicts with the decisions reached in at least six other circuits and with the decisions of this Court in *Schneble* and *Harrington*.

II

The Court of Appeals' Affirmation of the District Court's Determination That Wilburn Pickens Was Denied Access to Counsel, in Violation of Miranda, Is Erroneous and Violates the Principles of Law Set Out in 28 U.S.C. §2254(d).

Throughout his quest to avoid conviction and punishment for the crime in which he participated, Wilburn Pickens, one of the respondents, has repeatedly asserted that his written statement was taken in violation of his constitutional rights as enunciated by this Court in *Miranda v. Arizona*, 384 U.S. 436 (1966). Pickens has alleged in state and federal court, that after his arrest he was threatened with physical harm by police officers on three occasions, deprived of his reading glasses so he could not read the statement, and denied access to counsel by police despite his request for counsel. Mr. Pickens raised these questions in the state trial court to no avail. His lawyers assigned these issues to the Court of Criminal Appeals of Tennessee and

to the Supreme Court of Tennessee, to no avail. Mr. Pickens raised these same issues in his federal habeas corpus application and first found relief in the district court's determination that he was denied access to counsel prior to interrogation. The Sixth Circuit Court of Appeals affirmed this determination and the petitioner/State contends this affirmation is erroneous and violates 28 U.S.C. § 2254(d).

As the record demonstrates, Mr. Pickens, after his arrest actually made two statements, one oral and one written. The admission of the oral statement was prevented at trial because the State had not supplied Mr. Pickens' counsel with a copy thereof. A redacted version of the written statement given by Pickens was admitted at trial. The admission of the redacted version of Pickens' statement occurred only after a lengthy state court hearing, held without the jury, during which testimony was heard from Pickens, his attorney, and six members of the Memphis Police Department. (See State Record, pp. 348-416). Throughout this hearing, Pickens contended that the admission of the statement violated the principles of *Miranda* because he had requested counsel and was denied access to counsel. Also, Pickens contended that he had indicated an unwillingness to cooperate and the police continued their interrogation. During the testimony of the six police officers each of them was asked whether Pickens requested counsel prior to interrogation or whether he was denied access to counsel. The testimony of each and every one of these officers clearly and consistently established that Pickens did not request counsel prior to interrogation, was fully advised of his right to counsel, and was, in fact, allowed the opportunity to contact counsel if he so desired. (See State Record, pp. 349-351, 353, 355, 357, 359-361, 365-367, 404-406, 408-411, 414-415). The testimony of these officers established that Pickens was advised on numerous occasions of his constitutional rights, he was further given an opportunity to utilize the telephone, waived this opportunity in writing, and he never made any request whatsoever or indicated

any desire to communicate with his attorney prior to making his statement.

In the face of this testimony Pickens offered only his own interested version of the facts and the testimony of his lawyer, who was not present prior to the statement. The only evidence which the lawyer could offer concerns a conversation he had with Pickens prior to his arrest.

Therefore, the issue before the State trial judge was very simply one of credibility. The issue was crystal clear—did Pickens request access to counsel? Six police officers said he didn't, he said he did, and his lawyer said he had told him to do so in such a situation. The judge heard the testimony, viewed the demeanor of the witnesses, knew the interest of those testifying, and found that *Miranda* had not been violated, and the statement was admissible. Simply stated, the judge decided not to believe Pickens and was not convinced by his testimony. In reversing the trial court on other grounds, the Tennessee Court of Criminal Appeals considered this assignment and found it without merit. The Supreme Court of Tennessee reversed the Court of Criminal Appeals and in doing so, impliedly agreed with the determination made by the Court of Criminal Appeals and the trial court as to the admissibility of the statement.

Pursuant to the habeas corpus proceeding, an evidentiary hearing was held in Memphis, Tennessee on April 29, 1977. The evidentiary hearing did nothing to extend the scope of the State trial court's hearing, produced no other evidence or witnesses which were not before the trial court, and simply consisted of Mr. Pickens and his attorney attempting to recount their state trial testimony almost five years after testifying in state court, and almost seven years after the facts occurred. The State did not call any witnesses. The Memphis police officers who were still available were placed on call and offered to opposing counsel if they so desired. This offer was

refused and the State submitted and relied upon the state court transcript from the original hearing. Therefore, the record before the district court was exactly what was before the state trial court. Furthermore, Pickens testimony in federal court was filled with inconsistencies as he attempted to recount his trial testimony some five years later.[2]

In his memorandum opinion, the District Judge concluded, after the evidentiary hearing, that Pickens was denied access to his attorney and the admission of his confession was constitutional error in that it violated *Miranda*. The District Court's action simply amounts to a reevaluation of the evidence. This procedure is nothing more than a reweighing of the evidence in a factual controversy that has already been determined in a more complete hearing. The district court redecided the credibility issue with regard to the access to counsel issue, and held contrary to the state court even though the district court hearing was not as complete. The Sixth Circuit affirmed.

This Court's decision in *Townsend v. Sain*, 372 U.S. 293 (1963), is the precursor of 28 U.S.C. § 2254(d). In *Townsend* this Court set forth general standards governing the holding of hearings on federal habeas corpus petitions. Those standards now appear in 28 U.S.C. § 2254(d). Under the standards laid down in *Townsend* and embodied in 28 U.S.C. § 2254(d), a determination made on the merits of a factual issue by a state court of competent jurisdiction is entitled to a presumption of correctness in a federal habeas corpus proceeding unless the applicant of the writ can prove one or more of the first seven standards listed in § 2254(d), or unless the federal court concludes that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination.

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[2] Numerous discrepancies occur in Pickens' testimony in federal court. These inconsistencies occur even though the State trial record was filed with the federal court and was available to Pickens months before his testimony.

In *LaVallee v. Delle Rose*, 410 U.S. 695 (1973), this Court further elaborated on *Townsend* and 28 U.S.C. § 2254(d). In *LaVallee* the District Court for the Southern District of New York held that the state trial judge had not made an adequate determination within the meaning of 28 U.S.C. § 2254(d), which would have entitled the state court's finding to a presumption of correctness and placed the burden on petitioner to establish by convincing evidence that the state court's conclusions were erroneous. The district court, therefore, held its own hearing, found the confessions there involuntary, and ordered the applicant discharged or retried. A divided panel for the Second Circuit affirmed. *See LaVallee, supra*, at 1204; *See also* 342 Fed. Supp. 567 and 468 Fed.2d 1288. This Court reversed in a situation somewhat analogous to the case sub judice.

The admissibility of the confession at issue in *LaVallee*, like the admissibility of the confession in this case, revolved around basically one important issue—credibility. Simply stated, as this Court recognized in *LaVallee*, the confession of the applicant in *LaVallee* would have to be suppressed if the applicant's version of the facts were believed. Accordingly, the confession was admissible if the trier of facts chose not to believe the applicant's version. The district court and the court of appeals in *LaVallee* both based their decisions on what they perceived to be an inability to ascertain exactly the reasoning of the state trier of fact. This Court rejected this overly technical application of *Townsend* and, recognizing the simplicity of the major issue before the state trier of fact, reversed the Second Circuit.

Even the dissenting justices in *LaVallee* recognized that an overly technical application of *Townsend* was not intended by this Court. In dissent, Mr. Justice Marshall stated:

> "The precise problem encountered by the courts below in evaluating the state court's conclusion—a problem which the court now effectively ignores—is that the issue of voluntariness in this case presents just the sort of difficult mixed question of law and fact which *Townsend* recognized would make federal courts speculation concerning the basis for unreasoned state court action wholly inappropriate. To be sure, where, for instance, a defendant alleges simply that a confession was extracted from him by means of a physical beating administered by the police, it is obvious that if the defendant's story is believed the confession would be involuntary. Thus, even if a state court holds the defendant's confession to be voluntary without articulating any reasons, a federal district court may safely assume that in such an uncomplicated situation the state court's determination resulted from a rejection of defendant's factual allegations."

See LaVallee, supra, 93 S.Ct. 1203, 1207, 1208.

This case is analogous to the situation before this Court in *LaVallee*. In both cases a district judge has taken a factual determination reached by a state trier of fact at a hearing which complies with the mandate of *Townsend*, and substituted his own judgment. In both cases the basic issue boiled down to one of credibility. However, for at least two reasons, the district court decision in the instant case is more peculiar than the district court decision reached in the *LaVallee* case. First, in the instant case, as mentioned above, the District Judge, with the exact same evidence before him, found he was prohibited by § 2254(d) from reviewing the other factual questions regarding Pickens' confession. Second, the District Judge in *LaVallee* apparently found, prior to the District Court evidentiary hearing, that the presumption of correctness in § 2254(d) did not apply. In the instant case the District Judge made no such finding until after the evidentiary hearing. Thus, the State entered the evidentiary hearing assuming reliance upon the presumption of correctness. Obviously, the State was operating without a presumption of correctness since a contrary decision was returned without the

admission of anything new. The federal proceeding was simply a presentation of a part of the evidence heard in state court. The result is clearly erroneous and violates the principles of law set out in 28 U.S.C. § 2254(d) and elucidated by this Court in *Townsend* and *LaVallee*.

CONCLUSION

For all these reasons, the State of Tennessee, through Chief Harry Parker, respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

Nos. 77-1463-65

United States Court of Appeals
For the Sixth Circuit

James Randolph, Wilber Pickens, Isaiah Hamilton,
Petitioners-Appellees,
v.
Chief Harry Parker,
Respondent-Appellant.

Appeals from the United States District Court for the Western District of Tennessee.

Decided and Filed May 19, 1978.

Before: Edwards, Peck and Keith, Circuit Judges.

Edwards, Circuit Judge. This appeal involves a sequence of events which have the flavor of the old West before the law ever crossed the Pecos. The difference is that here there are no heroes and here there was a trial.

In July of 1970 a Las Vegas gambler named William Douglas came to Memphis with dob[1] and gun and an assumed name. Using the services of a runner with the improbable name of Woppy Gaddy, who had been promised a cut of the take, Douglas was introduced to Robert Wood, a sometime Memphis gambler. In three evenings of gambling with cards marked by Douglas, Wood was relieved of $5,000. He was also filled with

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[1] A dob is a device (which Douglas wore under his collar) which contained a preparation for marking cards so that the professional dobber could read their backs, but his amateur opponent could not.

suspicion and plans for recoupment. A fourth encounter of a similar kind left Douglas dead on the floor from a pistol shot fired by Robert Wood, and Robert Wood in possession of some of the money he had lost. In the long denouement, it also resulted in life sentences for murder for Robert Wood, Joe Wood, his brother, and three other Memphis men who are the subjects of this appeal.

These habeas corpus petitions, filed by Randolph, Pickens and Hamilton, were heard in the United States District Court for the Western District of Tennessee and resulted in the issuance of three writs of habeas corpus requiring the state to discharge petitioners unless they are promptly retried. The writs were issued by Chief Judge Bailey Brown of the Western District who, after evidentiary hearings, found violations of the right of confrontation guaranteed by the Sixth Amendment of the United States Constitution as to all three petitioners in their joint state court felony murder trial. Judge Brown based his ruling on the holding of the United States Supreme Court in *Bruton v. United States*, 391 U.S. 123 (1968). He also found violation of petitioner Pickens' right to counsel, as guaranteed by the Sixth Amendment under the Supreme Court's interpretation of *Miranda v. Arizona*, 384 U.S. 436 (1969).

On review of the entire record of the federal habeas hearing and the prior state trial, we find ample support for the District Judge's findings of fact, and we agree with his well-reasoned conclusions of law. We affirm.

We recite the state's theory of this case from the District Judge's summary thereof:

> In July, 1970, Robert Woods had lost a considerable amount of money in head-to-head card games with one Douglas and had become convinced that Douglas had been cheating him. In anticipation of still another game, Robert asked his brother, Joe Woods, to arrange to "have the game robbed," and in this way regain most, if not all, of what he had lost. Joe Woods then enlisted petitioner Hamilton, an employee of his, who associated petitioners Randolph and Pickens,[2] to carry out this venture. While the card game was in progress, petitioners, by pre-arrangement, were waiting in the vicinity of the apartment where it was being held. Joe Woods and one Tommy Thomas were in the apartment watching the game. Joe left the apartment and brought petitioners back with him, but failed to gain entrance for them when Douglas, hearing strange noises in the hallway, refused to allow the door to be opened. However, later, after petitioners had returned to their place of waiting, Joe did obtain admission for himself into the apartment. Shortly thereafter, Joe pulled a pistol on Douglas and Thomas, and then, handing the pistol to Robert Woods, went to tell petitioners to move in on the game. (Obviously, matters were not going according to plan.) Before petitioners reached the apartment, however, Douglas went for his pistol with the result that Robert Woods shot and killed him. Within seconds after the shooting, Joe and the petitioners knocked the apartment door down and entered, Robert then took all of the cash, and later petitioners Hamilton and Randolph (but not petitioner Pickens) were paid $50.00 for their participation.

The state's problems of proof in relation to the two Wood brothers were quite different from those applicable to the current petitioners. Witness Thomas testified explicitly to Douglas' method of cheating Robert Wood at cards and to his (Thomas') complicity in it. He also testified to Joe Wood's producing a pistol (after Robert Wood accused Douglas of cheating him) and that Joe Wood handed the gun to Robert and ran out of

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[2] All three petitioners in this case are black, whereas all the card players and watchers were white.

A police officer was allowed to testify, over objection, to an oral statement by Randolph that a coconspirator (presumably Joe Wood) had told Randolph "that the money was going to be taken even if he had to kill" Douglas.

the room. Thomas then testified that with only himself, Douglas and Robert Wood in the room, he heard a shot and saw Douglas fall fatally wounded.

Robert Wood was the only one of the five codefendants who testified before the jury at the state court trial. Although he had originally given the police a statement which obviously sought to accuse outsiders to the poker game of killing Douglas, at the trial he admitted firing the fatal shot. His evidence sought to mitigate the shooting by testifying about his reasons for believing that Douglas was cheating him and to present a self-defense theory by claiming that Douglas reached for his own gun before he (Robert Wood) fired.

The state's problems in relation to the three present petitioners were considerably greater. None of them took the stand. Eyewitness Thomas could not identify any of them. Robert Wood, who had originally denied that he killed Douglas, admitted at trial that he had killed Douglas. He also testified that Hamilton (whom he had known as an employee of Joe Wood) was one of the three armed black men who entered the room *after* he (Robert Wood) had killed Douglas. He was unable to make a clear identification of petitioners Pickens and Randolph as the other two participants at the scene. The state's reliance, as a result, was primarily upon the admission of oral or written statements said by the Memphis police to have been furnished voluntarily by the three petitioners.

While each such statement was redacted to the extent of eliminating the other two petitioners' names, they were such as to leave no possible doubt in the jurors' minds concerning the "person[s]" referred to.

It should also be noted that at the original trial, motions to suppress the Randolph and Pickens statements were made on grounds of physical abuse and threats, but were denied by the state court trial judge after some rather vivid coercion com-

plaints. The District Judge found no federal constitutional abuse in the state trial judge's finding on this score and no issue concerning coercion is presented on this appeal.

The state trial judge also gave in each instance an instruction to the jury that the confession admitted could only be used against the defendant who gave it and not as evidence of guilt of the codefendants.

As indicated above, all five of the defendants in the state court trial were found guilty of first degree murder and sentenced to life imprisonment.

After their state court trial convictions and sentences, all five defendants appealed. The Tennessee Court of Appeals set the convictions aside on the ground that the *Bruton* rule, *Bruton v. United States*, 391 U.S. 123 (1968), had been violated by the admission of confessions by coconspirators who did not testify and were not subject to cross-examination, and because under Tennessee law, felony murder had not been made out in relation to these three parties who had not entered the room at the time of the shooting. The Tennessee Supreme Court, however, reversed on both of these issues. It construed Tennessee felony murder law broadly enough to include these three petitioners because they were parties to a prior robbery plan. The court also held that each defendant's own statement "interlocked with" and corroborated the other statements of the other two defendants. In these contentions it found justification for the admission of all three confessions as to petitioners, citing *Harrington v. California*, 395 U.S. 250 (1969) and *Schneble v. Florida*, 405 U.S. 427 (1972), and some Tennessee case law (*see O'Neil v. State*, 2 Tenn. Crim. App. 518, 455 S.W. 2d 597 (1970)).

It should be noted that no court which has dealt with these three petitioners' *Bruton* contentions has sought to treat the admission of the three confessions as harmless error.

The Bruton Issue

In *Bruton v. United States, supra,* the United States Supreme Court set forth the rule of law which we believe governs this case. The Court's opinion said:

> [A]s was recognized in *Jackson v. Denno, supra,* there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt v. Utah, supra; Throckmorton v. Holt,* 180 U.S. 552, 567; *Mora v. United States,* 190 F. 2d 749; *Holt v. United States,* 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer v. Texas, supra.* * * * It was enough that that procedure posed "substantial threats to a defendant's constitutional rights to have an involuntary confession entirely disregarded and to have the coercion issue fairly and reliably determined. These hazards we cannot ignore." 378 U.S., at 389. Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witness against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. The effect is the same as if there had been no instruction at all. See *Anderson v. United States,* 318 U.S. 350, 356-357; cf. *Burgett v. Texas,* 389 U.S. 109, 115. *Reversed.*
>
> *Reversed.*

Bruton v. United States, supra at 135-37 (footnotes omitted).

We find no instance where the rule just stated has been overruled or altered in subsequent Supreme Court opinions.

In the case presently before us, the *Bruton* rule of exclusion would therefore apply to all police evidence concerning the confessions (written or oral) said to have been given by the three present petitioners. No one of the petitioners took the stand or was available for cross-examination by his codefendants. As to each defendant, testimony concerning the two other confessions was purely hearsay and was admitted without any possibility of in-court confrontation.

We find no language in the *Harrington* or *Schneble* cases relied upon by the state which holds testimony concerning the confessions of joint defendants to be admissible under such circumstances with or without judicial admonitions to the jury.

As we read the Supreme Court opinions in *Harrington* and *Schneble,* the sole issue pertained to whether or not (assuming the codefendants' confessions had been admitted in violation of *Bruton's* interpretation of the confrontation clause) there were nonetheless admissible proofs of such force as to make the constitutional error "harmless beyond reasonable

doubt." *See Chapman v. California*, 386 U.S. 18 (1967). In *Harrington* the Court's opinion described such proofs as "so overwhelming that unless we say no violation of *Bruton* can constitute harmless error, we must leave this state conviction undisturbed." *Harrington v. California, supra* at 254. And the Court, in addition to other admissible evidence indicating guilt, noted specifically that a codefendant who testified and was cross-examined had placed Harrington in the store with a gun when the murder was committed. The clearly admissible facts in *Schneble* were equally clearly probative of participation in the murder there involved.

This court has sought faithfully to follow the teachings of *Bruton, Harrington* and *Schneble. See Glinsey v. Parker*, 491 F.2d 337 (6th Cir.), *cert. denied*, 417 U.S. 921 (1974); *United States v. Brown*, 452 F.2d 868 (6th Cir. 1971), *aff'd*, 411 U.S. 223 (1973), and *Hodges v. Rose*, 570 F.2d 643 (6th Cir. 1978). In the last two cases we found *Bruton* violations, but our analysis of the clearly admissible evidence showed it to be so strong as to make the *Bruton* error harmless beyond reasonable doubt.

We recognize that the majority opinions in both *Harrington* and *Schneble* accepted the defendant's own confession as part of the evidence to be weighed as admissible in determining whether the violation of the *Bruton* rule was or was not harmless error. Since all three of these confessions were inadmissible at this joint trial, we find this holding conceptually difficult in this case. Nonetheless, we accept at face value each of the defendants' confessions in this case as it might apply in a single trial against him. So considered in each case, we find such evidence, plus the testimony of Robert Wood, sufficient to support, but certainly not so overwhelming as to compel the jury verdict of guilty of first degree murder. As indicated below, there might be reasons to reach a different conclusion as to

these defendants if they were contesting a jury verdict of armed robbery rather than first degree murder.

In evaluating the question of harmless error in this case, it is important to point out the factors which might affect a jury's verdict in relation to these three defendants in separate trials where the *Bruton* rule was observed:

1) Randolph, Pickens and Hamilton were not involved in the gambling game between Douglas, the Las Vegas gambler, and Robert Wood, the hometown gambler who got cheated.

2) They were not involved in originating the plan for recouping Robert Wood's losses.

3) They were not in the room (and had not been) when Robert Wood killed Douglas.

4) Indeed, the jury could conclude from the admissible evidence in this case that when Joe Wood pulled out his pistol, the original plan for three "unknown" blacks to rob the all-white poker game was aborted and that petitioners' subsequent entry into the room did not involve them in the crime of murder.

Additionally, if we return to consideration of the joint trial, that jury as charged by the state court judge had the responsibility of determining whether or not any of the three confessions testified to by Memphis police was voluntarily given. Assuming that two of the three confessions had been removed from jury consciousness by adherence to *Bruton*, we find it impossible to conclude that the jury finding and ultimate verdict would, "beyond reasonable doubt," have been the same.

These factors serve to distinguish this case from *Harrington v. California, supra*, and *Schneble v. Florida, supra*, and to convince us that the *Bruton* errors found by the District Judge cannot (as he also held) be determined to be harmless beyond reasonable doubt.

We are fully aware that our rejection of the "interlocking" confession theory underscores a conflict between the holding of the Sixth Circuit in *Glinsey v. Parker, supra, United States v. Brown, supra,* and *Hodges v. Rose, supra,* and the views of the Second Circuit, as exemplified by *United States ex rel. Catanzaro v. Mancusi,* 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied,* 397 U.S. 942 (1970); *United States ex rel. Ortiz v. Fritz,* 476 F.2d 37, 39-40 (2d Cir.), *cert. denied,* 414 U.S. 1075 (1973), and *United States ex rel. Stanbridge v. Zelker,* 514 F.2d 45, 48-50 (2d Cir.), *cert. denied,* 423 U.S. 872 (1975).

The Second Circuit rationale is set out in the first of these cases as follows:

> Catanzaro's final claim is that the failure of the trial court to grant his motion for a separate trial prejudiced his right to a fair trial. He relies on Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968) and United States ex rel. Hill v. Deegan, supra, [268 F. Supp. 580 (S.D.N.Y. (1967)] and argues that because the confession of the codefendant McChesney was introduced at the joint trial the writ of habeas corpus should be granted here.
>
> The reasoning of *Hill* and *Bruton* is not persuasive here. Both of those cases involved a defendant who did not confess and who was tried along with a codefendant who did. In our case Catanzaro himself confessed and his confession interlocks with and supports the confession of McChesney.
>
> Where the jury has heard not only a codefendant's confession but the defendant's own confession no such "devastating" risk attends the lack of confrontation as was thought to be involved in *Bruton*. See 391 U.S. at 136, 88 S.Ct. 1620.

> *United States ex rel. Catanzaro v. Mancusi, supra* at 300.

Catanzaro was decided on the heels of *Bruton v. United States, supra.* As noted above, there has been much debate on differing facts, as to whether a violation of the *Bruton* rule should or should not be held to be harmless error beyond reasonable doubt. But in no instance has the Supreme Court overruled *Bruton* or suggested that either identity or greater or lesser similarity of confessions presented by hearsay and without confrontation served to make them admissible. *See Harrington v. California, supra,* and *Schneble v. Florida, supra.* We believe that *Bruton v. United States* is controlling law. We also believe that there is a great difference between holding that hearsay and unconfronted confessions are admissible as to others than the confessor in joint trials, and holding that such confessions are inadmissible and, where admitted in error, must result in new trials unless the court can say that the constitutional error was harmless beyond reasonable doubt. *But see Metropolis v. Turner,* 437 F.2d 207, 208-09 (10th Cir. 1971) and *United States v. Walton,* 538 F.2d 1348, 1353-54 (8th Cir.), *cert. denied,* 429 U.S. 1024 (1976).

While there are conflicting Circuit Court opinions[3] which are both supportive of and contrary to the views expressed above on the *Bruton* violation and harmless error issues, this court's view was stated earlier in an opinion by our then colleague

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[3] 1. Cases Rejecting "Interlocking" Confession Admissibility:

a. Expressly:

Hodges v. Rose, — U.S. — (6th Cir. 1978) (Nos. 77-1374-75, slip. op. at 6); *United States v. DiGilio,* 538 F.2d 972, 981-83 (3d Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977).

b. Impliedly:

Hall v. Wolff, 539 F.2d 1146, 1148-49 (8th Cir. 1976); *Glinsey v. Parker,* 491 F.2d 337, 340-44 (6th Cir.), *cert. denied,* 417 U.S. 921 (1974); *United States v. Brown,* 452 F.2d 868 (6th Cir. 1971), *aff'd,* 411 U.S. 223 (1973); *Ignacio v. Guam,* 413 F.2d 513, 515-16 (9th Cir. 1969), *cert. denied,* 397 U.S. 943 (1970); *United States*

Judge Wade McCree. *See United States v. Brown*, 452 F.2d 868 (6th Cir. 1971), *aff'd*, 411 U.S. 223 (1973).

What we have written upon the *Bruton* issue requires our affirmance of issuance of the writs of habeas corpus. We therefore feel no need to write upon the second issue concerning the District Judge's finding that Pickens' right to counsel had been violated beyond noting that we have reviewed and we affirm his findings of fact and conclusions of law on this issue also.

The judgment of the District Court is affirmed.

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ex rel. Johnson v. Yeager, 399 F.2d 508, 510-11 (3d Cir. 1968), *cert. denied*, 393 U.S. 1027 (1969).

2. Cases Adopting "Interlocking" Confession Admissibility:

United States ex rel. Catanzaro v. Mancusi, 404 F.2d 296, 300 (2d Cir. 1968), *cert. denied*, 397 U.S. 942 (1970); *United States ex rel. Stanbridge v. Zelker*, 514 F.2d 45, 48-50 (2d Cir.), *cert. denied*, 423 U.S. 872 (1975); *United States ex rel. Duff v. Zelker*, 452 F.2d 1009, 1010 (2d Cir. 1971), *cert. denied*, 406 U.S. 932 (1972).

3. Cases Relying Upon Both "Harmless Error" and "Interlocking" Confession Admissibility (or Saying That the Choice of Doctrine Made No Difference):

United States v. Walton, 538 F.2d 1348, 1353-54 (8th Cir.), *cret. denied*, 429 U.S. 1025 (1976); *Mack v. Maggio*, 538 F.2d 1129, 1130 (5th Cir. 1976); *United States v. Spinks*, 470 F.2d 64, 65-66 (7th Cir.), *cert. denied*, 409 U.S. 1011 (1972); *Metropolis v. Turner*, 437 F.2d 207, 208-09 (10th Cir. 1971); *United States ex rel. Dukes v. Wallack*, 414 F.2d 246, 247 (2d Cir. 1969).

4. In *United States ex rel. Ortiz v. Fritz*, 476 F.2d 37, 38-40 (2d Cir.), *cert. denied*, 414 U.S. 1075 (1973), a panel of the Second Circuit questioned the "interlocking" confession doctrine but felt bound to follow it by *United States ex rel. Catanzaro v. Mancusi*, *supra*.

APPENDIX B

In the United States District Court
For the Western District of Tennessee
Western Division

James Randolph,
Petitioner,
v. Civil C-76-68

Chief Harry Parker,
Respondent.

Wilburn Pickens,
Petitioner,
v. Civil C-76-69

Chief Harry Parker,
Respondent.

Isaiah Hamilton,
Petitioner,
v. Civil C-76-310

Chief Harry Parker,
Respondent.

Memorandum Decision

(Filed May 2, 1977)

Petitioners, Hamilton, Randolph and Pickens, were convicted in early 1972 in the Criminal Court of Shelby County of the offense of felony-murder, in this case a homicide in the perpetration of an armed robbery, and they received life sentences.

The state's factual theory, in a nutshell, can be stated as follows: In July, 1970, Robert Woods had lost a considerable

amount of money in head-to-head card games with one Douglas and had become convinced that Douglas had been cheating him. In anticipation of still another game, Robert asked his brother, Joe Woods, to arrange to "have the game robbed," and in this way regain most, if not all, of what he had lost. Joe Woods then enlisted petitioner Hamilton, an employee of his, who associated petitioners Randolph and Pickens, to carry out this venture. While the card game was in progress, petitioners, by pre-arrangement, were waiting in the vicinity of the apartment where it was being held. Joe Woods and one Tommy Thomas were in the apartment watching the game. Joe left the apartment and brought petitioners back with him, but failed to gain entrance for them when Douglas, hearing strange noises in the hallway, refused to allow the door to be opened. However, later, after petitioners had returned to their place of waiting, Joe did obtain admission for himself into the apartment. Shortly thereafter, Joe pulled a pistol on Douglas and Thomas, and then, handing the pistol to Robert Woods, went to tell petitioners to move in on the game. (Obviously, matters were not going according to plan.) Before petitioners reached the apartment, however, Douglas went for his pistol with the result that Robert Woods shot and killed him. Within seconds after the shooting, Joe and the petitioners knocked the apartment door down and entered, Robert then took all of the cash, and later petitioners Hamilton and Randolph (but not petitioner Pickens) were paid $50.00 for their participation.

The commission of a homicide during the commission of a felony was murder at common law, and under Tennessee criminal statutes (TCA § 39-2402) such is murder in the first degree.

The Tennessee Court of Criminal Appeals reversed the convictions, holding that, since the shooting of Douglas had occurred before petitioners had reached the scene, they could not be guilty of felony-murder. The Supreme Court of Tennessee, however, granted certiorari, reversed the Court of Criminal Appeals, and reinstated the convictions. It held that the shooting of Douglas was within the res gestae of the robbery in which petitioners were taking part.

Thereafter, petitioners filed the instant habeas petitions, which have been before the magistrate for a report and recommendation. With the exception of two of the claims raised by petitioners, the magistrate concluded, with which we have concurred, that the claims of petitioners have been foreclosed by the determinations made in the state courts or that petitioners have not exhausted state remedies with respect to such claims. In particular, the magistrate concluded (and we have agreed) that the application of the felony-murder rule under these facts did not constitute a denial of federal due process.

The issues that we have before us, then, are the following:

1. Was petitioner Pickens deprived of a *Miranda* right when his confession was taken after, he contends, he has asked that his lawyer be present.

2. Were all three petitioners denied their right to confrontation and cross-examination under the *Bruton* decision when their confessions were read to the jury and none of them testified.

I

With respect to petitioner Pickens' *Miranda* claim, it should be pointed out that his claim in this general area is actually broader than that he was denied access to counsel. Indeed, he claims that the arresting officers threatened him with physical harm on two occasions while he was being brought to the police station and that he was threatened with such harm again while there before he signed a statement. Pickens also claims that, because the police had taken his glasses, he could not read and did not know what he was signing and that the facts in the statement were supplied by the police. Thus Pickens claims

that the signed statement was not a free and voluntary one and, indeed, that it was not his statement at all.

At the conclusion of the hearing on the admissibility of Pickens' confession, during which evidence had been introduced out of the presence of the jury on all of these matters, the state trial court overruled the motion to suppress on all grounds without elaborating. This court has concluded that, with respect to all of Pickens' contentions except that based on denial of access to counsel, the record supports the conclusion of the state trial court under the standards set out in 28 USCA § 2254 (d) and that this court therefore cannot review such determinations. Our conclusion, however, is to the contrary with respect to the claim of denial of access to counsel.

The facts surrounding Pickens' contact with his lawyer on the day before his arrest were undisputed in the state trial court and are undisputed here. On the day prior to his arrest, Pickens' picture appeared in a local newspaper, along with others, with a story saying that they were wanted for the Douglas murder. Pickens saw his picture and called a local lawyer, who already represented him in another matter, in the early evening and asked the lawyer to accompany him to the police station to turn himself in. The lawyer Anthony Sabella, had already seen the picture and story. Sabella advised Pickens that he could not go with him that evening and asked Pickens to come to his office the next morning and he would surrender Pickens to the police. Sabella also told Pickens that if, in the meantime, he were arrested, he must advise the police that Sabella was his lawyer and that he wanted his lawyer present for any questioning. Pickens was arrested in the very early hours of the next morning.

Pickens testified in the state court and here that he told the police more than once that Sabella was his lawyer and wanted to contact him and that the police denied him the opportunity.

The police testified in state court that Pickens never asked for a lawyer or mentioned Sabella.

It seems practically inconceivable to this court that Pickens, who had been in contact with his lawyer the evening before and had been instructed by his lawyer to tell the police that he wanted his lawyer present if he were arrested during the night, would not have mentioned this to the police, when they arrested him a few hours later and had him in custody. The police, it is true, testified that Pickens did not ask for or even mention that he had counsel, but the police were testifying about, to them, a routine event eighteen months after the event. We are satisfied, therefore, that this record does not support the finding that Pickens did not ask for access to his lawyer and on the contrary that the evidence is convincing that he did ask for access to his lawyer. 28 USCA § 2254(d).

We, therefore, conclude that the admission in evidence of Pickens' confession was constitutional error in that it violated his right as set out in *Miranda*.

II

As stated, each of the three petitioners contends that his right to confrontation and cross-examination, as such is set out in *Bruton*, was violated when the confessions of the other petitioners were admitted in evidence and neither of them took the stand and testified, although the trial court did charge the jury that each confession could be considered as evidence only against the defendant making the confession.

At the state trial, an effort was made so to redact the statements so that the identity of persons other than the declarant and persons not on trial could not be ascertained by the jury. This effort, however, was unsuccessful and respondent does not contend to the contrary.

The Supreme Court of Tennessee considered the *Bruton* problem and concluded that there was no constitutional error. Each of the confessions was consistent with the others so that they could be said to be interlocking confessions. It is not clear whether the Tennessee court considered that there was no such error because, under these circumstances, *Bruton* simply does not apply or because, under these circumstances, the violation of *Bruton* was harmless error.

In any case, respondent, relying on such cases as *Stanbridge v. Zelker*, 514 F.2d 45 (2nd Cir. 1975), holding that there was no *Bruton* violation because there were interlocking confessions, contends that the same result should be reached here so far as the *Bruton* case is concerned. In *Glinsey v. Parker*, 491 F.2d 337 (6th Cir. 1974), however, our Court of Appeals held that *Bruton* applied where there were interlocking confessions. We therefore conclude that, as of now, the rule in this circuit is different from that in the Second Circuit.

Respondent alternatively contends that, even if *Bruton* applies and was violated, such was harmless error beyond a reasonable doubt. This contention raises the question whether the confessions of petitioners Hamilton and Randolph, the admission of which this court has held not to have been constitutional error, could themselves be the basis of a finding that the *Bruton* violation was harmless. Again, in *Glinsey, supra*, at 343-344, our Court of Appeals seems to hold that the proper admission of a confession does not cure the *Bruton* problem as to the confessor. Moreover, other than the confessions of these petitioners, the only other evidence of their guilt is the testimony of Robert Woods whose identification of petitioners Randolph and Pickens was very weak. Still further, there was no proof, except in the confessions, that petitioners had been, though Joe Woods, a part of a pre-arranged robbery plan, a necessary ingredient to their conviction of felony—murder; Robert Woods supplied no such proof in his testimony.

Accordingly, we conclude that the right of these petitioners to confrontation and cross-examination was violated under *Bruton* and we cannot find that the violation of the *Bruton* principle was harmless error beyond a reasonable doubt.

Order for Judgment

It is therefore ORDERED that the Clerk will enter a final judgment providing that petitioners will be discharged from custody unless (1) the State of Tennessee retries them within a reasonable time or (2) respondent timely appeals this decision in which case the discharge of petitioners will be stayed pending appeal.

ENTER this 2 day of May, 1977.

/s/ (Illegible)
Chief Judge

APPENDIX C

In the Supreme Court of Tennessee
at Jackson

December 15, 1975

State of Tennessee,
Petitioner,

vs.

Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilbur Lee Pickens,
Respondents.

Shelby Criminal
Honorable
Perry H. Sellers,
Judge

FOR PETITIONER:

David M. Pack
Attorney General
Nashville, Tennessee

Robert H. Roberts
Assistant Attorney General
Nashville, Tennessee

Joe Patterson
Don D. Strother
Assistant District Attorneys General
Memphis, Tennessee

FOR RESPONDENTS:

Hugh Stanton, Jr.
Memphis, Tennessee

H. H. McKnight
Memphis, Tennessee

Robert L. Smith
Memphis, Tennessee

Charles J. Cassell
Memphis, Tennessee

Anthony J. Sabella
Memphis, Tennessee

Opinion

(Filed December 15, 1975)

REVERSED PER CURIAM

This case presents two principal issues, viz: (1) whether the facts justify an application of the "felony-murder" rule, and (2) whether the admissibility of certain confessions of the co-defendants constitute a violation of the rule enunciated in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The five defendants were convicted of murder in the perpetration of robbery and were sentenced to life imprisonment. The Court of Criminal Appeals reversed and remanded for a new trial.

I

The record reveals the following crucial facts surrounding this homicide.

Approximately three weeks prior to the night of the incident at issue, July 6, 1970, a poker game was arranged by one Walter Lee (Woppy) Gaddy between respondent, Robert Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional gambler from Las Vegas had agreed to give Gaddy a cut of his winnings in exchange for the use of his apartment, and his effort at setting up Robert Wood. Wood arrived for this first game, anticipating the presence of several participants, yet only he and the deceased, as planned, showed up. The final result of this initial encounter was that Wood lost "twenty-some hundred dollars."

A similar pattern was followed for the second meeting one week later. This game also produced a similar result. Wood losing another fifteen hundred ($1,500) to two thousand ($2,000) dollars.

For the scheduled third meeting of July 3, 1970, Wood, his suspicions of being cheated[1] having increased with each game,

[1] The record reflects that Douglas was playing with a marked deck. He was utilizing a wax substance on a deck of paper cards which was discernible to the trained eye.

decided to bring along an acquaintance, Tommy Thomas, who had the reputation of being a "pretty good poker player." However, the fathers of Thomas and Douglas had been close friends, and Thomas was also persuaded to fix the game by losing some one thousand ($1,000) dollars, six hundred ($600) dollars of which had been put up by Wood.

The fourth meeting between Douglas and Wood was set for July 6, 1970, again at Gaddy's apartment. Wood, convinced he was being cheated, asked his brother, Joe E. Wood, to come along. The extent of Robert Wood's plan to retrieve the four thousand five hundred ($4,500) dollars he had lost is best demonstrated by his own testimony:

Q. Now, was your brother in any of these other games?

A. No, sir.

Q. How did he happen to come this time?

A. I had told him that I would probably need some money and I told him I suspected the man was cheating.

Q. Did you say anything to him about getting some help?

A. I told him that several people there and they had guns and so forth. I told him I suspected the man was cheating me. If I caught him cheating me, I was going to ask for my money back and I might need some help to get it back.

* * * * * * * *

Q. And, you mentioned to him that you thought you were being cheated, is that correct?

A. Yes, Sir.

Q. And, what else did you tell him?

A. I told him that I, we was getting plastic cards.

Q. That you were getting plastic cards?

A. To play with and I was going to see if I could catch him cheating in any way.

Q. And, did you tell him that there were men out there with guns if I understood you right?

A. I said the man had some guns there.

Q. Did you say anything to him about getting some help?

A. He said that he would bring somebody with him. I didn't know exactly who or how many.

Q. Said he would bring somebody with him?

A. That worked for him.

* * * * * * * *

Q. Now, they were—you understood that he was to bring some people with him that worked for him, is that correct?

A. Yes, sir.

Q. What were they coming there for?

A. If I caught the man cheating, I was going to demand my money back and I did not figure he would be willing to give it up that easily.

Q. So you could say that they were coming there to rob this man, is that correct?

A. Well, if you would call it that, I would call it if you had been cheated out of your money, you just got your money back, it wouldn't be considered as robbing somebody.

Robert's brother, Joe, responding to this plea for assistance, contacted two of the other respondents, Isaiah Hamilton and Wilbur Pickens, enlisting them in this scheme. Joe Wood, on July 4, 1970, took them to the Benbow Apartments (where the game was to be held), pointing out the particular apart-

ment, and he promised them three hundred ($300) to four hundred ($400) dollars to rob the game explaining to them that his brother was being cheated. He also told them that he would be inside the apartment and would "kill him (Douglas) if I have to."

On the night of July 6, Joe Wood enlisted a third companion, James Randolph. Randolph, having been informed of the situation with the same brief yet decisive language used by Joe Wood with Hamilton and Pickens, joined these two and the trio headed for the Benbow Apartments.

At Gaddy's apartment the scene was as follows: Robert Wood and Douglas began playing poker around 7:30 p.m. Joe Wood and Tommy Thomas (who had come at the invitation of Douglas) sat in the same room as spectators. Between 8:30 p.m. and 9:00 p.m. Joe Wood announced he was going to get some more beer. He asked Thomas to accompany him, but Thomas elected to remain. While supposedly out getting beer, Joe Wood met with his three enlisted companions.

After a brief trip to the nearby Krystal Restaurant, a purchase of some beer, and a positioning of the automobiles, the four approached the apartment. As they neared the apartment, Thomas heard the sounds of several people. He placed himself near the door. Douglas, fearing a break-in, ran to the bedroom, returning with a shotgun. He stood in front of the door armed with the shotgun and a pistol which he pulled from his belt. After repeated inquiries by Thomas as to who it was, during which Joe Wood's three companions returned to their car, Joe Wood convinced him he was alone. Yet, as a precautionary measure, Douglas made Joe Wood crawl through a small window next to the front door. During all this Douglas remained armed with two weapons, pointed at the incoming Wood.

Once Joe Wood was in the room, Douglas was convinced the situation had returned to normal, and announced his intention to resume the game (approximately eighteen hundred ($1,800) dollars was on the table at this time). At this point, Robert Wood expressed his desire to quit and leave but Douglas still armed with two weapons, would not so agree, and he stated that the game would continue until the money on the table was completely won or lost. Reluctantly Robert Wood sat down.

The game having been resumed for only five to ten minutes, Joe Wood arose, and asked permission to go into the bathroom. He exited the bathroom armed with a derringer, and walked behind Douglas, ordering Thomas and him to lie on the floor. Thomas quickly responded, but Douglas remained sitting. Joe Wood then handed the derringer to his brother, who remained stunned at these totally unexpected actions (Robert Wood testified he did not even know his brother was armed, especially since he was fiercely quizzed by Douglas as he crawled in through the window). Joe then darted out the door, leaving it open.

At this point, Thomas in an effort to avoid any shooting, rose from the floor, telling Robert Wood "that they had to talk this thing out", and went to front door, where he closed and locked it. As he was returning toward the poker table, Douglas made a move for the pistol in his belt, and Robert Wood "spun around and snapped one shot" into Douglas' chest.

Within seconds after the shooting, the three armed men kicked in the door and one of them fired a shot at Robert Wood because he was armed, the bullet landing in the wall above his head. (The record demonstrates that after Joe Wood exited the apartment, he called to his three companions who came running from their nearby car). One of the three searched Thomas, taking from him a knife and eighty ($80) dollars. Robert Wood then took all the money on the table (some two thousand ($2,000) to two thousand five hundred ($2,500) dollars) and stuffed it in his pockets. Everyone then exited with the exception of Thomas who remained behind to attend to Douglas.

Four of the five respondents then met at the apartment of Isaiah Hamilton, where the weapons were hidden, and Hamilton and Randolph were given fifty ($50) dollars apiece. Pickens, who had left the car prior to arriving at Hamilton's apartment, received no money.

Subsequent to the incident, all five respondents were either arrested or surrendered themselves to Memphis police. Statements were taken from all except Joe Wood. At the trial only Robert Wood took the witness stand. The statements of Hamilton, Pickens, Randolph and Robert Wood, all being found by the trial judge to have been freely and voluntarily given, were admitted into evidence through the testimony of several officers of the Memphis Police Department.

In an effort to comply with the rule enunciated in *Bruton v. United States, supra,* the trial court and all counsel diligently attempted a program of redaction for each of the total four statements. These efforts are revealed through several entire volumes of the bill of exceptions. In short, any reference by one defendant as to another defendant was replaced with "blank" or "another person." The Court of Criminal Appeals, in its majority opinion found this particular type of redaction to be inappropriate and not in full compliance with the *Bruton* rule.

In summarized form, as to the crucial facts, the evidence reveals:

> (1) that Tommy Thomas witnessed the felonious actions of Joe Wood, Randolph, Pickens and Hamilton, and he saw Robert Wood actually shoot William Douglas;
>
> (2) that Robert Wood took approximately two thousand ($2,000) dollars from the poker table;
>
> (3) that the actual physical shooting preceded the ultimate robbery by only a few seconds;

> (4) that Robert Wood fired upon Douglas after the latter reached for a pistol in his belt.
>
> (5) that all the respondents were operating under a scheme of some proportions to retrieve the money lost by Robert Wood to William Douglas.

Based upon these presented facts, all five (5) defendants were convicted of murder in the perpetration of a robbery, § 39-2402 T.C.A. On appeal the Court of Criminal Appeals in a split decision reversed and ruled:

> There is nothing to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confession of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.
>
> [Court of Criminal Appeals opinion, p. 3, Judge Mitchell dissented as to this ruling, stating that the facts clearly demonstrated an overall robbery plan, and that the jury's finding of guilt is not overcome by a preponderance of the evidence, citing *State v. Grace*, 493 S.W.2d 474 (1973)].

II

We cannot concur with the majority's assessment of evidence on the issue of felony-murder.

In his multi-volume work on criminal law and procedure, Wharton defines the felony-murder rule at §251 as follows:

> A murder committed in the course of the perpetration of a felony is murder on the theory that the element of malice may be implied from the fact of the commission of a felony, even though the killing is unintentional and accidental.
>
> *Wharton's Criminal Law and Procedure* Vol. 1 (1957).

This concept of implied or imputed malice was statutorily recognized in Tennessee in 1829 with chapter 23 of the Public Acts of that year which ultmately produced §39-2402 T.C.A. This statute now reads in pertinent part:

> 39-2402. *Murder in the first degree.*—An individual commits murder in the first degree if:
>
> * * * * * * *
>
> (4) he commits a willful, deliberate and malicious killing or murder during the perpetration of any arson, rape, *robbery*, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb. (Emphasis supplied)

In applying §39-2402 T.C.A. the courts of this State have consistently held that killing is murder in the first degree, regardless of whether malice and premeditation are proven, where such is done in the commission of a robbery. *Phillips v. State*, 2 Tenn.Crim.App. 609, 455 S.W.2d 637 (1970). *Woodruff v. State*, 164 Tenn. 530, 51 S.W.2d 843 (1932).

Additional cases offer more definitive treatment of the felony-murder rule. Quoting from *Wharton on Homicide*, this Court in the case of *Smith v. State*, 209 Tenn. 499, 354 S.W.2d 450 (1961) pronounced:

> Where a person is killed by another in perpetrating, or attempting to perpetrate, a felony or criminal act calculated to cause death, the premeditated intent to commit a felony or other criminal act is, by implication of law, transferred from that offense to the homicide actually committed, so as to make the latter offense a killing with malice aforethought constituting murder in the first degree. In such case the turpitude of the criminal act supplies the place of deliberate and premeditated malice and is its legal equivalent and the purpose to kill is conclusively presumed from the intention which is of the essence of the criminal act intended. And such a murder is a murder in the first degree under such statutes, though it is casual and unintentional.
>
> 354 S.W.2d at 450, 451

The killing must have been done in pursuance of the unlawful act, and not collateral to it: it must have an intimate relation and close connection with the felony and not be separate, distinct and independent from it. *Farmer v. State*, 201 Tenn. 107, 296 S.W.2d 879 (1956). For the felony-murder to apply, it is necessary that the homicide be a natural and probable consequence of the commission or attempt to commit the felony. *Wharton*, § 252, *supra*.

However, it is not necessary that the defendants believe that death would result. As pronounced by Justice Felts, when speaking for this Court in *Dupes v. State*, 209 Tenn. 506, 354 S.W.2d 453 (1962):

> A murder committed in the perpetration of or attempt to perpetrate, 'robbery', is murder in the first degree. (T.C.A. § 39-2402).
>
> When they thus entered upon a common design to commit a felony, the natural and probable consequences of

> which involved the contingency of taking human life,[2] all were res, nsible for the acts of each committed in furtherance of such design even though the killing was not specifically contemplated. (citations omitted)
>
> 354 S.W.2d at 456

Although the cumulative import of the evidence as recited above is that no physical harm was planned as to the deceased, each and every defendant either through words or actions demonstrated his knowledge that "killing may be necessary." Each foresaw the probable consequence of homicide.

The majority opinion by the Court of Criminal Appeals seemed to view the timing of the events as the crucial factor in their conclusion of the non-application of the felony-murder doctrine. The fact that the shooting was prior to the actual taking of money from the apartment was controlling in their minds. We feel that this limited "timing" analysis is an oversimplification of the felony-murder rule, and is contrary to the law in this State.

In *Smith v. State, supra*, this court applied the concept of "res gestae" to the issue of felony murder. In that case the defendant argued that the killing which occurred prior to the actual taking of any money, was not done in pursuance of the robbery, but collateral to it. The facts of the case were that the defendant upon entering a liquor store informed the proprietor, who was positioned behind the counter, of his intentions of robbery. When refused money, defendant drew a pistol. The proprietor also drew a gun and attempted to fire it at the intruder, to which the defendant retaliated with a deadly shot to the chest of the store owner. This Court, in rejecting

[2] Historically, the felony-murder doctrine applies only to felonies that are inherently or foreseeably dangerous to human life, of which robbery is unanimously included. See Annotation, Felony Murder—"Dangerous" Felonies, 50 A.L.R.3d 397.

defendant's argument that the homicide was collateral to the robbery, stated:

> We think that unquestionably this killing was done and is part of the *res gestae* of the whole acts embracing the robbery. It had a close and intimate connection with the felony and grew out of the attempt to commit the felony.
>
> 354 S.W.2d at 452.

(This application of "res gestae"[3] to cases of felony-murder has been recognized in eighteen (18) additional jurisdictions. See Annotation, Felony Murder Rule—"Termination of Felony" 58 A.L.R.3d 851).

The felony-murder rule applies when the killing occurs during the commission of or the *attempt to commit* the felony. *Wharton* §251, *supra; Smith v. State, supra.* The evidence demonstrates that each defendant was carrying out or attempting to carry out a scheme of robbery. During the attempt to activate this plan, the deceased was shot and subsequently died; a natural and foreseeable consequence of activity which endangers human life. By the agreement between the defendants to pursue the illegal action of a robbery, the act of one coconspirator (Robert Wood) in pursuance of that purpose was an act for which criminal liability attached to each defendant. *Williams v. State*, 164 Tenn. 562, 51 S.W.2d 482 (1932); *Dupes v. State, supra*, and *Wharton* §251, *supra.*

There remains one tangential issue, derivative of the felony-murder rule in this case. Defendant Robert Wood claims that

[3] There are numerous decisions from multiple jurisdictions which apply the felony-murder doctrine to homicides which occur after the actual commission of the felony, eg. during the escape. The separation of time and/or place between the felony and the homicide is usually answered by ruling that the delayed homicide was part of the res gestae or in pursuance of the felony. (See 58 A.L.R.3d 851, *infra*, at section 6.) This case presents the inverse situation wherein the homicide precedes the actual commission of the felony. However, the application of the principle of res gestae is equally appropriate.

he shot the deceased only after he reached for a gun in his belt. The testimony of Tommy Thomas corroborates this version of the homicide. However, this implied formulation of a self-defense theme is inappropriate in a felony-murder case.

This Court answered this particular proposition in *Smith v. State, supra,* holding that a robber could not claim self-defense in a prosecution for first degree murder committed during such robbery, because:

> Under such circumstances when one brings on the act by approaching another with a gun and demands money, he is not, should not, and cannot be in a position to say, 'Well, I killed him because I thought he was going to shoot me.' He is the instigator and author and brings about the whole chain reaction, and thus cannot defend on this ground.
>
> 354 S.W.2d at 452

III

The latter, and equally difficult issue of this case is a consideration of the admission of certain evidence in light of the holding in *Bruton v. United States, supra.*

As noted previously, each of the statements given to Memphis police authorities by Robert Wood, Randolph, Pickens and Hamilton, were admitted through the testimony of the interrogating officer. And, as cited, each went through a laborious process of redaction, whereby references by the confessing defendant as to the other defendants were replaced with "blank" or "another person."

It should be stressed that Robert Wood's inculpatory testimony (in direct variance to his confession wherein he stated that Randolph, Pickens and Hamilton shot Douglas and robbed

the game) went way beyond the replaced references to him within the statements of Randolph, Pickens and Hamilton, for none of them actually witnessed the shooting. And, in addition, the record reveals that the confessions of these three were strikingly similar in content, both in their original and redacted versions.

In the *Bruton* case, two co-defendants, Evans and Bruton, were jointly tried on a federal charge of armed postal robbery. Although Evans did not testify, a prior oral confession by Evans, implicating both Bruton and him, was admitted through the testimony of a postal inspector. The trial court instructed the jury that although Evans' confession was competent evidence against Evans, it was inadmissible hearsay against Bruton and must be disregarded in determining the guilt or innocence of Bruton. In light of the trial court's limiting instructions, Bruton's conviction was affirmed by the Eighth Circuit Court of Appeals. On certiorari. the United States Supreme Court reversed as to Bruton's conviction.

The full import of this decision can best be demonstrated through several extracted portions of the opinion, which will follow a brief examination of the evolution of the *Bruton* rule.

The *Bruton* case presented the identical question considered by the United States Supreme Court in *Delli Paoli v. United States,* 352 U.S. 232, 77 S.Ct. 294, 1 L.Ed.2d 278 (1957), i.e., whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a co-defendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence. In a 5-4 opinion the Court ruled that under appropriate instructions to the jury protecting the implicated defendants, the admission of such a confession was not reversible error. The basic premise upon which the *Delli Paoli* decision rested was the belief that it was fair to proceed under the assumption that the jury

was capable of following the judge's repeated admonitions concerning the utility of the confession. 352 U.S. 239.

Between the *Delli Paoli* and *Bruton* decisions, the United States Supreme Court confronted an analogous situation in *Douglas v. State of Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). In that case, a mutually inculpatory confession by one defendant was admitted into evidence at the separate trial of a co-defendant. The defendant at the latter trial was denied the opportunity to cross-examine his accuser because he had exercised his Fifth Amendment privilege. The Court reversed the conviction, ruling that such a procedure denied the defendant "the right of cross-examination secured by the Confrontation Clause," 380 U.S. 419 (relying upon *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923).

With this particular case law development in mind, the Court in *Bruton* reasoned:

> *Delli Paoli* assumed that this encroachment on the right to confrontation could be avoided by the instruction to the jury to disregard the inadmissible hearsay evidence. But . . . that assumption has since been effectively repudiated.
>
> 391 U.S. at 128 (with reference to the *Pointer v. Texas, supra*, and *Douglas v. Alabama, supra*, decisions).

Adopting the language of Justice Frankfurter in his dissent in *Delli Paoli* as to the jury instructions the Court pronounced:

> "The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition therefore becomes a futile collection of words and fails of its purpose of a legal protection to defendants against whom such a declaration should not tell."
>
> *Id.* at 129.

Recognizing the attack that its ruling would have upon the viability and vitality of the jury system, the Court pointed out:

> *Not every* admission of inadmissible hearsay or other evidence can be considered to be reversible error unavoidable through limiting instructions; instances occur in almost every trial where inadmissible evidence creeps in, usually inadvertently. . . . It is not unreasonable to conclude that *in many* cases, the jury can and will follow the trial judge's instructions to disregard such information. (Emphasis supplied)
>
> *Id.* at 135.

Yet the Court concluded with explicit reaffirmance that a confession which inculpates a co-defendant, yet evades confrontation is inadmissible hearsay and, standing alone is reversible error. This firm conclusion is inescapable from a reading of the following pronouncements:

> Nevertheless . . . *there are some contexts* in which the risk that the jury *will not, or cannot*, follow instructions is so great, and the consequences of failure so vital to the defendant, *that the practical and human limitations of the jury system cannot be ignored.* (Emphasis supplied)
>
> *Id.* at 135.

* * * * * * *

Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination. *The*

effect is the same as if there had been no instruction at all. (Emphasis supplied)

Id. at 137.

Following the *Bruton* decision, an exception to the application of this rule emerged through two particular decisions. Both *Harrington v. California*, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969) and *Schneble v. Florida*, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972) stand for the proposition that a violation of the Bruton rule in the course of a trial does not require reversal, if evidence of guilt is so overwhelming, that the prejudicial effect of the co-defendant's admission is so comparatively insignificant as to clearly be harmless error. (In each of these cases, the evidence of overwhelming guilt was in major portion, a product of the defendant's own confession.) This "overwhelming evidence" exception has been recognized by the courts of this State. *Taylor v. State*, 493 S.W.2d 477 (Tenn.Crim.App. 1972).

However, prior to this recognition of the exception pronounced in *Harrington v. California, supra,* the Tennessee Court of Criminal Appeals had carved out an additional judicial limitation to the application of the *Bruton* rule. In the opinion of *O'Neal v. State*, 2 Tenn.Crim.App. 518, 455 S.W.2d 597 (1970) the court, in applying the *Bruton* doctrine to a situation where all co-defendants made inculpatory, intertwining confessions, yet none testified, stated:

> In this record under these facts and circumstances, with Bruton v. United States, supra, in mind, to say this was error, i.e., violative of the confrontation clause of the Sixth Amendment, to allow these statements to be used in evidence we believe not.
>
> * * * * * * *

> We are of the opinion this is one of the contexts in which the jury under the facts and circumstances developed could obey and follow the instructions of the court as found in this record.
>
> 455 S.W.2d at 603

This pronouncement was relied upon as direct precedent in a subsequent case, *Briggs v. State*, 501 S.W.2d 831 (Tenn. Crim. App. 1973) for the legal proposition that the *Bruton* rule is inapplicable where all of the jointly tried co-defendants confess.[4] We reiterate the observation recently made by Justice Cooper while speaking for this Court in *State v. Elliott*, 524 S.W.2d 473 (Tenn. 1975):

> We think this statement is an over-simplification of the impact of the *Bruton* rule.
>
> 524 S.W.2d at 477

The facts of this case, when combined with the particular pattern of confessions and testimony by the various defendants, present a hybrid *Bruton-Schneble-O'Neil* problem.

The major criterion for the *Bruton* application is satisfied through the admissibility of confessions of the defendants, implicating their various co-defendants, without such co-defendants being afforded the opportunity of a cross-examination of their accusors.

Yet, the "overwhelming guilt" exception to *Bruton* announced in *Schneble v. Florida, supra,* also has direct application to defendants, Robert and Joe Wood. Robert's own testimony es-

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[4] There is a clear division among the jurisdictions as to the proper *Bruton* analysis in a situation where two or more co-defendants make mutually inculpatory, interlocking confessions which are admitted at trial. Courts have ruled that such admission is: (1) erroneous; (2) erroneous but harmless error; and (3) not erroneous. See Annotation, Confrontation Clause—Bruton Rule, 29 L.Ed.2d 931, 981-989.

tablishes his guilt with greater specificity than do any of the three redacted confessions (either singly or cumulatively) of his co-defendants. (This is especially true since the confessing co-defendants had no visible knowledge of the actual homicide.) In addition, Robert's version of the homicide is corroborated in detail by the testimony of the eye-witness Tommy Thomas. Robert Wood's effort to plead self-defense is inappropriate, *Smith v. State, supra;* and his guilt is demonstrated through "overwhelming evidence", thus causing any possible *Bruton* violation to be harmless error. *Schneble v. Florida, supra.*

This "overwhelming guilt" analysis also has application to the guilt or innocence of defendant, Joe Wood. The testimony of both Robert Wood and Tommy Thomas (who were subject to cross-examination) reveal Joe Wood as the initial instigator of the actual felony-murder. In addition, independent evidence (through several State witnesses who were neighbors of Woppy Gaddy) places Joe Wood at the entrance to Gaddy's apartment prior to and immediately following the shooting. Also, the record reflects that the confessions of Hamilton, Pickens and Randolph were sufficiently "cleansed" of any direct references to Joe Wood. And he did not suffer under the potential burden of group identification as did the three enlisted participants. Even accepting that the cumulative import of the three confessions caused some prejudice to attach to Joe Wood, their admissibility was harmless error in light of the overwhelming evidence against him, *Schneble v. Florida, supra.* His guilt in the felony-murder was properly established.

Finally, the interlocking inculpatory confessions of Randolph, Pickens and Hamilton is a situation akin to that addressed in *O'Neal v. State, supra.* The confessions of Randolph, Pickens and Hamilton clearly demonstrated the involvement of each, as to crucial facts such as time, location, felonious activity, and awareness of the overall plan or scheme. As pointed out by this Court in *State v. Elliott, supra:*

> The fact that jointly tried co-defendants have confessed precludes a violation of the *Bruton* rule where the confessions are similar in material aspects . . .
>
> 524 S.W.2d at 478

This observation is more clearly understood through a direct comparison of such a situation to the facts from which *Bruton* emerged. As noted previously, *Bruton* involved a situation where the co-defendant through a confession (and not testimony) implicated the defendant in contradiction and repudiation to the defendant's testimony. Unlike *Bruton,* and like *O'Neil,* this case includes a situation where three co-defendants confess with similar, intertwining versions of their own actions. The contradiction and repudiation found in *Bruton,* upon which the prejudicial deprivation of confrontation rests, is simply not present. See *United States ex rel. Dukes v. Wallack,* 414 F. 2d 246, (2nd Cir. 1969). Added to this, in the instant case, is the fact that Robert Wood through direct testimony identified Randolph, Pickens and Hamilton as the three other participants. The guilt of this trio was presented to the jury without any prejudice attaching under a *Bruton* analysis. A defendant is entitled to a fair trial but not a perfect one. *Lutwak v. United States,* 344 U.S. 604, 73 S.Ct. 481, 97 L.Ed. 593 (1953). Such was afforded these five defendants.

Accordingly, the decision of the Court of Criminal Appeals is reversed, and the convictions of each defendant, as determined by the jury, is affirmed.

PER CURIAM.

APPENDIX D

The Court of Criminal Appeals of Tennessee
at Jackson

January 1974

Appeal from the Criminal Court of Shelby County
Honorable Perry H. Sellers, Judge

Robert Hugh Wood, Joe E. Wood, Isaiah Hamilton, James Albert Randolph and Wilber Lee Pickens,
Plaintiffs in Error,
vs.
State of Tennessee,
Defendant in Error.

No. 41
Shelby County

For Plaintiffs in Error:

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Judgment Reversed and Remanded
Opinion by Judge Charles Galbreath

(Filed: June 5, 1974)

Opinion

The five defendants in this case were jointly indicted, tried and convicted of murder in the perpetration of robbery and each sentenced to life imprisonment in the State penitentiary. Each was represented by retained counsel in the trial court and each has filed assignments of error and a brief in support thereof in this Court.

Of the numerous errors assigned by these defendants, those attacking the sufficiency of the evidence and the admissibility of confessions appear to have merit. To bring these contentions into focus, the evidence is summarized as follows:

Approximately three weeks prior to July 6, 1970, a poker game was arranged by Walter Lee (Woppy) Gaddy between the defendant, Robert Hugh Wood, and the deceased, William Douglas, alias Ray Blaylock. Douglas, a professional Las Vegas gambler, had made arrangements with Gaddy to use the latter's apartment and for Gaddy to make the initial contact with the defendant Wood. Under the arrangement Gaddy was to receive a cut of the winnings for the use of the apartment and for making the set-up. Wood was told that several people were to play in the game, but as planned only Wood and Douglas showed up for the game.

During the first game, Wood lost about "twenty something hundred dollars." A week later, a second game was played at Gaddy's apartment and Wood lost another $1,500 to $2,000. A third game was played a few days before July 6th, but this time between the deceased and Tommy Thomas, an acquaint-

ance of Wood who had a reputation of being a "pretty good" poker player. Thomas played with $1,000 of which $600 had been put up by Wood. The purpose of this game was to determine if and how the deceased was cheating. Thomas, however, was the son of Titanic Thomis, a well known professional gambler and a close friend of the deceased. Tommy, as prearranged with the deceased, lost the game and reported to Wood that as far as he could tell the deceased was not cheating. Actually cheating was accomplished by transferring a small amount of colored wax onto white areas of the playing cards from a supply of the substance, called a "dob" by the witness Thomas, concealed under the shirt collar of Douglas in a small metallic container.

A fourth game between Douglas and Wood was set up for July 6, 1970, at Gaddy's apartment. Wood, still suspecting that Douglas was cheating, took his brother Joe along with him. Tommy Thomas was also present at the game. Joe had arranged for the other co-defendants, Randolph, Hamilton and Pickens, to come by the apartment to help get his brother's money back by staging a "hold up".

During the course of this fourth game, Joe Wood left to get some beer. When Joe returned with the beer, Tommy Thomas and Douglas heard others outside the apartment, and fearing a robbery attempt Douglas brandished a .38 caliber pistol and an automatic shotgun. Joe convinced them that he was alone, but as a precautionary measure, Douglas made Joe enter the apartment through a small window. After this incident Robert Wood wanted to stop the game and leave, but Douglas insisted that the game continue. The game was resumed and after a few minutes Joe Wood went to the bathroom. On his return he was carrying a small caliber derringer pistol, and he ordered Thomas and Douglas to lie on the floor. Thomas complied with the demand but Douglas remained seated at the table. Joe handed the gun to his brother and left through the front door. According to his undisputed testimony Robert Wood stood there with

the gun down by his side, and when Thomas got up from the floor and was in the process of locking the front door he saw Douglas make a move and shot him as the deceased was reaching for his gun. Immediately following the shooting, Joe and the other three co-defendants forced their way into the apartment. The money on the table was taken, as was a knife and about $50 from Tommy Thomas, and then all five of the defendants fled.

While we are well aware of the presumptions and burden of proof facing the defendants in their challenge on the sufficiency of the evidence, we are also aware of our duty to intercede and reverse the trial court where the evidence is clearly insufficient to support the conviction. Under the facts as presented in this particular case, we must follow the latter course of action.

There is nothing in this record to indicate that the shooting took place as part of or in perpetration of the robbery of the deceased. To the contrary, the evidence clearly reflects that Robert Wood shot the deceased prior to the taking of the money from the apartment. The testimony of State's witness Tommy Thomas supports Robert Wood's statement that he shot Douglas as the latter was going for his gun. There is no evidence offered by the prosecution which supports the theory that Robert Wood was participating in the robbery of William Douglas at the time he shot Douglas. Even the confessions of co-defendants Randolph, Hamilton and Pickens, support the conclusion that the shooting was not part of a robbery attempt.

The defendants have also challenged the admission into evidence of the confessions of the co-defendants Randolph, Hamilton and Pickens and the statement of Robert Wood. Their contention is that since the confession implicates not only the confessing defendant but also other co-defendants, and since the confessing defendants did not take the stand, the co-defendants were denied their Sixth Amendment right to confrontation of witnesses against them. *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620. This claim appears to have merit as regards the confessions of Randolph, Hamilton and Pickens but

not regarding Robert Wood's statement. Robert Wood took the stand and was therefore subject to cross-examination by the other defendants.

Although an attempt was made to avoid prejudice to the other defendants by omitting their names from the confessions as read to the jury, a reading of the confessions clearly indicates that mere omission of names was not sufficient to avoid harm to the other defendants. As judge Dwyer said for this Court in *White v. State*, 497 S W 2d 751:

> "To assume, as urged here by the state, that the insertion of 'the other person' cured any possible prejudice to Johnson would be legal sophistry. Or as Justice Learned Hand states, it would be a 'mental gymnastic which is beyond not only their (the jurors') powers, but anybody elses.' See Nash v. United States, 54 F 2d 1006, 1007 (2nd Cir. 1932). We have stated before that a statement of the confessing co-defendant could be used only if completely stripped of any incriminating references to the non-confessor. See Taylor v. State, Tenn. Cr. App., 493 S W 2d 477. In this context the insertion of 'the other person' does not meet that test. See Serio v. United States, 131 U S App D.C. 38, 401 F 2d 989, 990."

While reversal is not predicated solely on the incorrect admission of these confessions, such would have been the case had there not been any other error found by this Court.

All of the other assignments of error have been considered and found to be without merit. The case is reversed and remanded for a new trial consistent with this opinion.

/s/ CHARLES GALBREATH, Judge

CONCUR:

/s/ W. WAYNE OLIVER, Judge
JOHN A. MITCHELL, Judge

Dissenting and Concurring Opinion

I respectfully dissent in part and concur in part.

I agree that the admission in evidence of the confessions of the non-testifying co-defendants was a violation of the rule in *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L. Ed.2d 476, and prejudicial to the rights of those defendants who were deprived of the right to cross-examine the non-testifying co-defendants and therefore constituted reversible error. See opinion by Judge Robert K. Dwyer in *White v. State*, — Tenn. Crim. App. —, 497 S.W.2d 751.

Robert Wood contended that although the words "other party" and "another party" were substituted for the name "Robert Wood" in the statements of the co-defendants it was easy to see that Robert Wood was the name that had been eliminated from the statements.

Robert Wood may have been identifiable from his co-defendants' statements but, I am unable to find any merit in this contention because in the statements of Pickens and Hamilton they told about Robert Wood shooting Douglas. They heard the shot and on entering the room they saw Robert Wood with the pistol in his hand and Douglas lying on the floor. They heard Robert Wood say he shot Douglas. They also told about the plan to rob the poker game which was organized by Robert Wood's brother Joe Wood.

Robert Wood took the witness stand and testified substantially to a great many of the material facts contained in his co-defendants' statements.

Robert Wood told his brother Joe that the deceased was cheating and he intended to get his money back. That several people there had guns and he might need some help to get it

back. And he said he would bring somebody with him that worked for him.

Robert Wood said "If I caught the man cheating I was going to demand my money back and I did not figure he would be willing to give it up that easily.

On cross-examination Robert Wood was asked "so you could say that they were coming there to rob this man, is that correct?" Robert Wood answered, "Well, if you call it that, I would call it if you had been cheated out of your money, you just got your money back it wouldn't be considered as robbing somebody." Robert Wood said he did not catch him cheating and he did not ask for his money back.

That his brother Joe was to see to it that they got there. That he sat down and started playing again.

That he saw his brother come back in with the three male blacks, the co-defendants Wilber Pickens, Isaiah Hamilton and James Randolph with weapons and that he knew one shot was fired.

Robert Wood said he went there to get even if he could. That his brother Joe Wood said "he could bring some help if I thought I would need it." That the man might not want to give the money back, but he intended to get his money back if he caught him cheating. That he let his brother know he wanted him to bring help if he wanted to, that he did not tell him whether to come armed, that he figured his brother Joe would have a gun on him or in the car. That Joe said some of his help would be with him.

The district attorney asked "In talking about the understanding you had with your brother Joe Wood," "Now you've already said as I understood you that you asked him or that you agreed that he was going to bring some help because you were going to ask for your money back if you caught him cheating, is that

right?" The defendant Robert Wood answered "That's right." That he told Joe where the place was.

The defendant Robert Wood also testified he talked with his brother Joe Wood about getting his money back and that he wanted his brother to bring help if he wanted to do so. That he figured his brother Joe would either have a gun on him or in his car. That his brother Joe told him some of his help would be there. Robert Wood said he helped to plan the game in order to get back what he had lost. That he had lost heavily, perhaps $4,000.00. That his brother Joe came along armed and furnished him the pistol with which he shot Douglas. That he shot and killed Douglas and then took the money which was over $2,000.00 from the gambling table. That they planned what story they would tell if arrested, and he cautioned his confederates not to involve him and Joe on the matter and fled. That the next morning he went back to Mississippi.

I do not think the defendant Robert Wood can escape the responsibility for his acts by saying he did not know of the robbery, or if he did know of it, the re-taking of the money was in a fake robbery and was for the purpose of recovering money illegally taken from him by a cheating gambler.

It seems to me that having testified about the facts contained in the statements of his co-defendants his testimony cleared or cured whatever objection he might make to the introduction of his co-defendants' statements.

In *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288, the Supreme Court said:

> "There are many cases in this jurisdiction and others which deal with the broad principle that if a defendant testifies in substance as to evidence which has been otherwise erroneously admitted, then his testimony clears whatever error there might have been. See *Zachary v. State*, 144 Tenn.

623, 234 S.W. 758; *Moon v. State*, 146 Tenn. 319, 242 S.W. 39; *Switzer v. State*, 213 Tenn. 671, 378 S.W.2d 760; *Owens v. State*, 202 Tenn. 679, 308 S.W.2d 423; *Cathey v. State*, 191 Tenn. 617, 235 S.W.2d 601; and others. Thus, these cases clearly show that the rule is not limited to the situation where the defendant takes the stand and admits he committed the crime with which he was charged."

In *McClain v. State*, — Tenn. Crim. App. — 455 S.W.2d 942, in an opinion by Judge Charles Galbreath, concurred in by Presiding Judge Mark A. Walker, and result concurred in by Judge W. Wayne Oliver, we cited and quoted *Hill v. United States*, 363 F.2d 176 (5 Cir.) where the Court said:

"We reject this assigned error for a second and entirely different reason. When Hill testified in his own behalf, he substantially repeated the accountant's testimony which is complained about in this assignment. If there was any error in the admission of the accountant's testimony, it was cured by Hill's testimony to the same facts. See *Barshop v. United States*, 192 F.2d 699 (5th Cir. 1951), cert. den. 342 U.S. 920, 72 S.Ct. 367, 96 L.Ed. 688 (1952). Thus we find no prejudicial error in the admission of the accountant's testimony, or the trial court's refusal to withdraw it from the jury's consideration. 363 F.2d 180, 181."

In *McGregor v. State*, — Tenn. Crim. App. —, 491 S.W.2d 619 cert. denied March 1973, in an opinion by Judge Robert K. Dwyer, concurred in by Walker, Presiding Judge, and O'Brien, Judge, we said:

"Further, when the defendant voluntarily took the witness stand at the trial and gave testimony explaining the presence of the weapon and the satchel that were introduced, he cured any illegal search question, because his own words established the existence of these two articles in his car. See *Lester v. State*, 216 Tenn. 615, 624, 393 S.W.2d

288. The assignment pertaining to the legality of the search is overruled."

Able counsel for the defendant Robert Wood in his excellent brief has made the contention that a new trial should be granted to Robert Wood because of the erroneous introduction of the statements of the non-testifying co-defendants in which they identified Robert Wood as the man who shot and killed William Douglas.

In considering this contention we are faced with the plain and positive fact that Robert Wood voluntarily took the witness stand and testified in his own behalf and admitted he fired the pistol shot which killed Douglas.

I think this contention is without merit.

I cannot agree with the majority opinion holding that the killing was not done in the perpetration of a robbery.

The robbery was planned for the purpose of assisting the defendant Robert Wood to recover the money he had lost in a gambling game with the deceased William Douglas.

I think the facts show that the robbery was commencing according to plan at the place and at the time of or a few seconds before Robert Wood shot and killed the deceased Douglas. Those who were to commit the robbery were at the door preparing to enter. It is true that the actual taking of the money was subsequent to the fatal shooting of Douglas.

The defendant Robert Wood testified he took the money from the table immediately after he shot Douglas.

I cannot agree with the holding of the majority opinion that the evidence is insufficient to support the conviction of Robert Wood. Robert Wood in his testimony says he shot and killed the deceased William Douglas at a time when Douglas was reaching for his gun.

The jury heard all the proof, saw and heard the witnesses testify, including the defendant Wood. The jury rejected the defendant Robert Wood's theory that he shot in his own necessary self defense.

The verdict of the jury approved by the trial court takes away the presumption of innocence which stood for the defendant in the trial court and he is here under the presumption of guilt. The burden is on the defendant to show that the evidence preponderates against the verdict. We may not reverse a conviction on the facts unless the evidence preponderates against the verdict and in favor of his innocence. *White v. State*, 210 Tenn. 78, 356 S.W.2d 411; *Holt v. State*, 210 Tenn. 188, 357 S.W.2d 57; *Gann v. State*, 214 Tenn. 711, 383 S.W.2d 32.

Moreover, it was the province of the jury to settle the issue of self defense. The jury heard the witnesses and observed them on the witness stand, passed on their credibility and decided in favor of the state's contention. I am unable to say that the evidence preponderates against the finding of the jury. *Arterburn v. State*, 216 Tenn. 240, 391 S.W.2d 648; *King v. State*, — Tenn. Crim. App. — 432 S.W.2d 490.

I would hold that the evidence does not preponderate against the jury's verdict and in favor of the innocence of the defendant Robert Wood.

In *Grace v. State*, 493 S.W.2d 474 (1973), the Supreme Court of Tennessee in reversing the judgment of the Court of Criminal Appeals said:

> "Neither this Court, nor the Court of Criminal Appeals is free to re-evaluate the evidence as it pleases. A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State. A verdict against the defendant removes the presumption of innocence and raises a presumption of guilt upon appeal. The defendant has the burden upon appeal of showing that the evidence preponderates against the verdict (and) in favor of his innocence."

I would affirm the judgment against the defendant Robert Hugh Wood.

/s/ JOHN A. MITCHELL
Judge